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In the

# Supreme Court of the United States

October Term, 1996

SOON DUCK KIM, *et al.*,
*Petitioners*,

v.

THE CITY OF NEW YORK,
*Respondent*.

## Petition for Writ of Certiorari to the Court of Appeals for the State of New York

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

May a city avoid liability under the Takings Clause for a permanent physical invasion of private property because the statute authorizing the invasion was enacted before the property was acquired by the aggrieved owner?

## PARTIES TO THE PROCEEDING

The following is a complete list of the parties named in the proceedings below.

Soon Duck Kim, Man Suk Jun, and In Myung Jun, as plaintiffs-appellants below.* The City of New York, a municipal corporation duly created under the laws of the State of New York, as defendant-respondent below. Laszlo's Car Wash, Inc., Laszlo Varga, Wilson, Elser, Moskowitz, Edelman & Dicker, and J.D.S Funding Group, Inc., as defendants below.**

## NOTICE OF RELATED CASES

On the same day that the Court of Appeals for the State of New York decided this case, the court also rendered opinions in *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 1997 WL 68232 (NY Feb. 18, 1997), *Basile v. Town of Southampton*, 1997 WL 68581 (NY Feb. 18, 1997), and *Gazza v. New York Department of Environmental Conservation*, 1997 WL 68590 (NY Feb. 18, 1997).

In all four cases the New York court held that fundamental attributes of ownership–such as the rights to use property or to exclude others–are transferred to the state when the title to private property changes hands. The parties in these four cases are not related. Separate petitions for writs of certiorari are being filed in each case.

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* References to petitioners herein are to the lead plaintiff-appellant below, Mrs. Soon Duck Kim.

** The only cause of action at issue on appeal before the Court of Appeals was Mrs. Kim's takings claim against the City.

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## PETITION FOR WRIT OF CERTIORARI

The petitioners, Soon Duck Kim, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of New York, entered in the above-entitled proceeding on February 18, 1997.

## OPINIONS BELOW

The decision of the Court of Appeals of the State of New York is reported as *Kim v. City of New York*, 65 U.S.L.W. 2541, 1997 WL 68593 (NY Feb. 18, 1997), and is reproduced as Appendix (App.) A. The decision of the Supreme Court, Appellate Division, is reported at 204 A.D.2d 711 (1996) and is reproduced as Appendix B. The final order of the Supreme Court is unreported and is reproduced as Appendix C. Page references are to the versions in the appendices.

## JURISDICTION

The final decision of the Court of Appeals of the State of New York was entered February 18, 1997. The New York court considered and decided the question of whether an uncompensated permanent physical occupation of private property constituted a violation of the Fifth Amendment to the United States Constitution. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2904 of the New York City Charter is set forth in full at petitioners' Appendix E.

## STATEMENT OF THE CASE

In June, 1990, the City of New York (City) dumped earth fill on 2,390 square feet of Mrs. Kim's commercial property. App. A-2.[3] The City insisted that Mrs. Kim was not entitled to compensation for this permanent physical invasion of her property. App. A-3. In fact, the City asserted that a provision of the New York City Charter obligated Mrs. Kim to bury her own property under fill–at her own expense–to provide support for a newly elevated City roadway. App. A-12.

One of the most essential attributes of property ownership is the right to exclude others. *Kaiser Aetna v. United States*.[4] This right is one which the government can never abrogate without incurring liability for a taking under the Fifth Amendment.[5] Because permanent physical occupations extinguish a property owner's right to exclude others, this Court has uniformly found such invasions to constitute a taking, "whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*[6]

Accordingly, Mrs. Kim challenged the City's permanent physical invasion of her property by filing a lawsuit in state court. App. C-2. In her motion for summary judgment, Mrs. Kim argued that the City's dumping of fill on 2,390 square feet of her land violated her rights under the Fifth Amendment to the United States Constitution by taking her property without payment of just compensation. *Id.*

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[3] Photographic excerpts from the record below depicting the City's invasion of Mrs. Kim's land are set forth in petitioner's Appendix D.

[4] 444 U.S. 164, 177 (1979).

[5] *Id.* at 180.

[6] 458 U.S. 419, 435 (1982).

The trial court rejected *Loretto*, relying instead on pre-*Loretto* state law to find that the City's burial of Mrs. Kim's property did not comprise a compensable taking. *Id.*

The New York Supreme Court, Appellate Division, affirmed the trial court's ruling. App. B-2. The court held that the City's dumping of fill did not constitute a permanent physical occupation of Mrs. Kim's property, observing that the fill was necessary to support the City's street and prevent erosion. *Id.* "Therefore, no 'taking' occurred." *Id.*

The New York Court of Appeals affirmed. App. A-1. The court held that constitutionally protected property interests are not defined by rules or understandings[7] existing at the time those interests are created. Rather, the court believed the definition of any given property interest changes over time and is determined by all manifestations of a state's power over property, "whatever [the] source," in force when a given owner acquires title. App. A-7. Under this holding, landowners acquiring title after land use regulations were enacted would not have protectable property interests inconsistent with the subsequent application of those regulations, even where as here an owner was forced to suffer the City's permanent physical invasion of her land. App. A-12, 14.

### A. The City of New York Raises the Grade of College Point Boulevard

In 1952, the City of New York established the legal grade for College Point Boulevard at 9.1 feet. Ten years later, Section 230 became part of the City Charter.[8] Under the section, the transportation department could at any time order a landowner to fill or raise their lot at the expense of the owner. App. A-22-24. In 1978, sixteen years after the charter provision was enacted, the City declared that the grade of the street should be raised from 9.1 to 13.5 feet. App. A-2. The City filed an alteration map reflecting the regrading in the Topographical Section of the Office of the

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[7] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).

[8] This charter provision evolved into Section 2904 with few changes. App. A-22.

Borough President of Queens. *Id.* No physical changes were made to the street at that time. *Id.*

### B. The City Buries 2,390 Square Feet of Mrs. Kim's Land with Fill to Support the City's Elevated Roadway

In 1988, Mrs. Kim purchased property fronted by College Point Boulevard. For the next two years, she operated a car wash and leased space for an auto shop on the site. App. A-2. In 1989, the City entered into contracts to raise the roadway 4.4 feet above the level of Mrs. Kim's property. The following year, 12 years after the City had filed the alteration map, the City commenced work on the roadway. Finally, in June of 1990, the City provided lateral support for its newly elevated street by dumping side fill on 2,390 square feet of Mrs. Kim's land. App. A-2.

### C. Mrs. Kim Sues the City for Physically Invading Her Land

Mrs. Kim filed suit in the New York Supreme Court, Queens County. App. C-2. In subsequent cross-motions for summary judgment, Mrs. Kim argued that the City violated her rights under the Fifth Amendment to the United States Constitution when the City buried 2,390 square feet of her once useable land under fill. *Id.*

Mrs. Kim argued that this Court's decision in *Loretto* was dispositive and required a finding that the City's dumping of fill on her property–burying land nearly 1,600 times the size of the cable box in *Loretto*–was a permanent physical occupation for which she was entitled to just compensation. *Id.*

The City responded that its invasion of Mrs. Kim's property was authorized by Section 2904 of the New York City Charter, under which the City could have compelled Mrs. Kim to bury her property at her own expense to provide lateral support for the City's roadway. *Id.*

### D. The Trial Court Grants Summary Judgment in Favor of the City, Holding That This Court's *Loretto* Doctrine Does Not Apply Where a City Charter Provision Obligates Mrs. Kim to Allow the City to Invade Her Property

The Supreme Court granted the City's motion for summary judgment. *Id.* The court agreed with the City's argument that the City could have forced Mrs. Kim to bury her own property with support fill at her own expense. *Id.* The court therefore concluded that no taking claim arose from the City's acquiring support for its roadway by burying Mrs. Kim's property under fill. *Id.*

In arriving at this conclusion the trial court expressly rejected *Loretto's per se* takings rule *relying instead upon an earlier, pre-Loretto lower court decision.*[9] *Id.* On this basis, the trial court held that Mrs. Kim was barred from any relief under the Takings Clause for the City's physical appropriation of her land. *Id.*

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[9] The court relied on a trial court decision, *Trubia v. Koch*, NY L. J. at 13, Col. 1 (Aug. 15, 1979), *aff'd*, 87 AD2d 742 (1982). In *Trubia*, under facts substantially identical to those at bar, a New York trial court held that the City's dumping of side fill on private land was not a compensable appropriation of that property. App. F-2-3. The *Trubia* court reasoned that "under statutory authority, instead of placing the fill on petitioners' property at its own expense, the City could have compelled the petitioners, at their own expense, to fill the property to legal grade." App. F-3.

*Trubia*, a case that has never before been relied on or cited in any published opinion, was decided three years before this Court's contrary holding in *Loretto*. Nonetheless, the trial court below dismissed as *meritless* Mrs. Kim's reliance upon *Loretto*, reasoning that

> the holding in *Loretto* did not announce any new legal principle which could not have been considered by the *Trubia* court, but merely reaffirmed a long-standing rule of law.

App. C-2.

Because *Trubia* has never been published in a case reporter, the opinion is set forth in full at petitioners' Appendix F.

### E. The Supreme Court, Appellate Division, Holds That Mrs. Kim's Property Was Not Taken Because She Had an Obligation to Dedicate Her Property to Support the City's Roadway

Mrs. Kim timely appealed this judgment to the Supreme Court, Appellate Division. In her briefs, she asserted that the dumping of the fill constituted a permanent physical occupation of her land by the City for which the United States Constitution required the payment of just compensation.[10] The appellate court affirmed. In a published decision, the court held that Mrs. Kim's constitutional claim necessarily must fail because the City's dumping of fill on Mrs. Kim's land was necessary to support the street and therefore "did not constitute a 'permanent physical occupation' of [her] property by the ... City" requiring compensation under the Fifth Amendment.[11] App. B-2.

### F. The New York Court of Appeals Holds That Mrs. Kim's Property Interests Do Not Include the Right to Exclude the City or Avoid Its Uncompensated Physical Invasion of Her Land

Mrs. Kim timely appealed this judgment to the New York Court of Appeals. App. A-3. She asserted that, under *Loretto*, any government-authorized "permanent physical occupation" of property is a taking, no matter how small the area occupied and without regard to the public interest served by the government's action.[12] Disagreeing, the Court of Appeals affirmed, holding that Mrs. Kim's title did not include the right to exclude the City from dumping fill on her land. App. A-4. The court began by holding that the "*corpus juris* of this State comprises constitutional law, statutory law and common law." App. A-7. Each of these–

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[10] Appellant's Opening Brief in the Supreme Court, Appellate Division, at 3-4.

[11] The Takings Clause of the Fifth Amendment is applicable to state and local government via the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235-37 (1897).

[12] Appellant's Opening Brief in the New York Court of Appeals at 7.

including every statutory enactment and land use decision–"establishes binding rules of property law, each play[ing] a role in defining the rights and restrictions contained in a property owner's title." *Id.*

The court determined the effect of the City Charter provision to be that Mrs. Kim's title in her land did not include a right to exclude the City from dumping fill to support its roadway. App. A-14-15. Therefore, she had no constitutional entitlement to compensation for the City's physical occupation of her land. *Id.*[13]

The court below purported to rely on this Court's discussion in *Lucas*, relating to a "logically antecedent inquiry into the nature of the owner's estate." App. A-4. However, the court held that its inquiry as to the rights of a property owner begins with an examination of every manifestation of a state's power, no matter what the source, in force when an owner acquires title. App. A-7.

In *Lucas*, this Court noted that it had refused to allow the government to permanently physically occupy privately owned land without paying just compensation to the owner.[14] Nonetheless, the New York court, creating its own doctrine, held that the charter provision was a "prevailing rule of the State's property law" when Mrs. Kim acquired her land and, accordingly, encumbered her title and diminished her constituent bundle of rights. App. A-14.

The holding below directly conflicts with the takings decisions of at least four other states, the United States Court of Appeals for the Federal Circuit, and this Court. Mrs. Kim now files this petition for writ of certiorari, asking this Court to resolve

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[13] The New York Court of Appeals interpretation of Section 2904 as creating a positive obligation of landowners to provide lateral support to city streets *when their elevation is raised* is fundamentally different in kind from the common law duty not to undermine existing improvements.

[14] *Lucas*, 505 U.S. at 1028-29 (citing *Loretto*, 458 U.S. at 426, and *Kaiser Aetna*, 444 U.S. at 178). *See also United States v. Lynah*, 188 U.S. 445, 465 (1903) (when government takes property, constitution requires payment of value of that appropriated).

the conflict concerning whether, by mere passage of land use restrictions combined with a subsequent transfer of title, the state may strip Mrs. Kim of the right to prevent the City from permanently physically occupying her land without paying just compensation.

## REASONS FOR GRANTING THE PETITION

### INTRODUCTION

The New York Court of Appeals has ruled that Mrs. Kim has no remedy for the permanent physical occupation of her property because she purchased her land after the City had enacted a charter provision authorizing such invasions. The City has stripped her of the right to defend her property from its physical invasion and taken to itself the right to occupy Mrs. Kim's property without compensation. Apparently, Mrs. Kim could not prevent the City from invading her lot because she no longer owned the exclusive right to use her land. According to the New York court's interpretation of the City Charter, when Mrs. Kim purchased her land, she acquired an interest substantially different in kind from the interests in land owned by her neighbors who purchased prior to the enactment of City Charter § 2904. When Mrs. Kim acquired title to her land the City took an easement giving itself the right to dump fill on her lot. Moreover, the scope of this easement, for which the City paid nothing, may be enlarged at any time, giving the City an unlimited right to bury more of Mrs. Kim's property each time it raises the elevation of its highway.

The New York court has determined that the most essential of all property rights–the right to exclude others–may be circumvented by legislative enactment. On the same day the Court of Appeals decided Mrs. Kim's case, New York's highest tribunal

also decided three other cases on identical grounds.[15] Together these decisions establish what amounts to a judicial doctrine that property rights can be involuntarily transferred to the state without payment of just compensation by legislative *fiat*.[16]

The doctrine adopted by the New York court below directly conflicts with decisions of the courts of four states, as well as with decisions of the United States Court of Appeals and of this Court. These conflicts involve two fundamental issues of federal constitutional law. First, the New York doctrine permits permanent physical invasions of private property by government without payment of just compensation. Second, the New York doctrine permits a state to redefine and transfer property interests to itself without compensation any time the ownership of land is transferred.

The New York court's holding that permanent physical invasions of private property do not require payment of just compensation directly conflicts with this Court's doctrine that a

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[15] *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 1997 WL 68232 (NY Feb. 18, 1997), *Basile v. Town of Southampton*, 1997 WL 68581 (NY Feb. 18, 1997), and *Gazza v. New York Department of Environmental Conservation*, 1997 WL 68590 (NY Feb. 18, 1997).

[16] Less than one week after the Court of Appeals crafted its doctrine, lower courts began applying and extending it. In *Brotherton v. Department of Environmental Conservation of the State of New York*, New York Supreme Court, Suffolk County, No. 12809-90 (Feb. 24, 1997), a Suffolk County court held that an owner who was precluded from making any economically viable use of his land had no property interest subject to protection under the Takings Clause because restrictive regulations were adopted prior to the property's transfer from a wholly owned corporation to the firm's sole shareholder. ***The sole legal ground cited for this decision was the new doctrine of the Court of Appeals which is the subject of the present petition.*** The *Brotherton* decision is set forth in full in petitioner's Appendix G.

*See also* Respondents' Brief at 43-44, *Berger Foundation v. City of Escondido*, 4th Civ. No. D027377 (Cal. App. 1997) (advocating application of the doctrine set forth in *Gazza*, *Anello*, and *Kim* that a property owner cannot establish a "taking" based on land use regulations that predate acquisition of land). Relevant portions of the brief are set forth in petitioner's Appendix H.

permanent physical occupation of real property is invariably a categorical or *per se* taking.[17] This Court has *never* upheld a permanent physical occupation of private property, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it," without payment of just compensation.[18]

Under the New York court's doctrine, an owner of land whose title preceded enactment of the charter provision may be able to bring an as-applied takings challenge. Mrs. Kim may not. An owner whose title predated enactment may receive just compensation for a permanent physical occupation. According to the decision below, Mrs. Kim does not have the right under the United States Constitution to receive just compensation for the invasion of 2,390 square feet of her land. Presumably, the City could have raised the street 10 or 20 feet, requiring *all* of Mrs. Kim's lot without having to pay any compensation. Thus, the New York court's doctrine directly conflicts with this Court's determination that an owner's rights are not altered merely because land is acquired after regulations are enacted. The full "bundle" of ownership rights run with the land. "Prior owners must be understood to have transferred their full property rights" when they convey property. *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

The New York court's decision that a landowner's rights can be divested and transferred to the City with every transfer of title conflicts sharply with the opinion of the United States Court of Appeals for the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525 (1996).[19] There, the Circuit Court of Appeals held that general legislation enacted after the creation of the property interests cannot "somehow redefine[] state-created property rights

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[17] *Loretto*, 458 U.S. at 426-27.

[18] *Lucas*, 505 U.S. at 1015. *Accord Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 181 (1871) (actual invasion of real estate by superinduced additions of water, earth, sand, or other material is a taking).

[19] The conflict between the opinion of the New York court and the Court of Appeals for the Federal Circuit is discussed *infra* at Section 1.E.

and destroy[] them without entitlement to compensation."[20] The federal court observed that because property interests are "fixed at the time of their creation," statutes enacted thereafter cannot–contrary to the New York doctrine–divest a property owner of those interests without constituting a taking.[21]

Furthermore, the holding of the court below conflicts with courts of at least four states that have held that an owner of property can challenge the application of regulations which were implemented before title to the affected property was acquired: *Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223, 1229 (5th Dist. Fla.), *review denied*, 613 So. 2d 3 (Fla. 1992) (a property owner entitled to compensation under Fifth Amendment where permit request to build home in residentially zoned land subject to wetlands protection act denied, based on the property's status as a wetlands);[22] *Lopes v. City of Peabody*, 32 Mass. App. Ct. 1124, 595 N.E.2d 812, *review denied*, 413 Mass. 1105, 600 N.E.2d 171 (1992), *cert. granted and judgment vacated*, 113 S. Ct. 1574 (1993), *on remand*, 417 Mass. 299, 303, 629 N.E.2d 1312, 1314-15 (1994) (purchaser of land subject to land use restriction at the time of purchase, has every right to challenge the continued application of the restriction);[23] *Moroney v. Mayor and Council of the Borough of Old Tappan*, 268 N.J. Super. 458, 465, 633 A.2d 1045, 1048 (1993), *cert. denied*, 136 N.J. 295, 642 A.2d 1004 (1994) (property owners "stand in the shoes of their predecessors in title" to challenge local zoning ordinance);[24] and *K&K Construction, Inc. v. Department of Natural Resources*, 217 Mich. App. 56, 64 (1996) (timing of a

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[20] *Preseault*, 100 F.3d at 1530.

[21] *Id.* at 1540 n.13.

[22] Discussed *infra* at Section I.A.

[23] Discussed *infra* at Section I.B.

[24] Discussed *infra* at Section I.C.

regulation and acquisition of property cannot act to preclude just compensation where it would otherwise be due).[25]

Because the newly enunciated doctrine of the New York Court of Appeals in the opinion below directly conflicts with the decisions of the courts of four states, as well as with the holdings of this Court and the Court of Appeals for the Federal Circuit, it is imperative that this Court grant certiorari to resolve the confusion created by the New York doctrine.

## I

## THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A DIRECT CONFLICT BETWEEN THE NEW YORK COURT OF APPEALS, THE COURTS OF FOUR STATES, AND THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT ON THE QUESTION OF LIABILITY FOR A TAKING OF PROPERTY UNDER THE FEDERAL CONSTITUTION

"Individual freedom finds tangible expression in property rights."[26] However if property rights are to have any meaning, the power of the state to alter the definition of *property* must have certain constitutional limits.

The New York Court of Appeals ignored those limits when it held that the right of a property owner to be free from physical invasions could be circumvented by a mere statutory enactment followed by a transfer of title of real property. Moreover, the New York court's doctrine directly conflicts with the decisions of the courts of four states and the Court of Appeals for the Federal Circuit on this important constitutional question.

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[25] Discussed *infra* at section I.D.

[26] *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

### A. The New York Doctrine Conflicts with the Florida Court's Understanding that Fifth Amendment Protections Are Not Abrogated Because a Property Owner Acquires Property After a Land Use Regulation Is Adopted

The underpinning of the New York doctrine that Mrs. Kim could not prevent the City of New York from physically invading her property is the fact that she purchased her property after the New York City Charter provision was enacted. App. A-14. However, Florida has considered and expressly rejected such a limitation on private ownership rights under the United States Constitution.

In *Vatalaro v. Department of Environmental Regulation*, the Florida District Court of Appeal held that the denial of a permit constituted a regulatory taking of property even though the denial was based on a regulation that existed before the owner acquired her land.[27]

The Warren S. Henderson Wetlands Protection Act was adopted in 1984.[28] Two years later, Mrs. Vatalaro purchased two residentially zoned lots. She wished to build two homes on ½ acre of her property, one for herself and one for her daughter who looked after her.[29] State authorities determined that Mrs. Vatalaro's property was located within a 20-acre wetland and required her to apply for a dredge and fill permit which was then denied.[30]

Mrs. Vatalaro challenged the permit denial on the grounds that it deprived her of all economically viable use of her property. The state argued that because Mrs. Vatalaro purchased her property after the enactment of the wetlands protection act, she

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[27] *Vatalaro*, 601 So. 2d at 1229.

[28] *Id.* at 1225.

[29] *Id.* at 1226.

[30] *Id.* at 1225-27.

had constructive notice that her building permit might be denied and therefore did not suffer a compensable taking.[31]

The Florida court strongly disagreed, holding that Mrs. Vatalaro had the right to build on her property and that the wetlands protection act, enacted before she purchased her land, did not insulate the state from takings liability arising from its denial of this right.[32] Mrs. Vatalaro's ownership rights were not less than those of her predecessor in interest because she purchased her land after the wetlands act was enacted.

Under the Florida court's holding, Mrs. Kim would be entitled to compensation for the City's permanent physical occupation of her property, even though the City Charter provision authorizing the occupation was enacted before she acquired her property.

### B. The New York Doctrine Conflicts with the Massachusetts Supreme Judicial Court's Declaration That Preexisting Land Use Regulations Do Not Divest Owners of Private Property Interests

In *Lopes v. City of Peabody*, the Supreme Judicial Court of Massachusetts held that a property owner is entitled to challenge a preexisting land use restriction that results in a taking of private property.

In the mid-1970s, the City of Peabody enacted a zoning ordinance that established a wetlands conservancy district in various parts of the city.[33] In part, the ordinance established minimum elevation and set-back requirements that had to be met before any construction could be approved.[34] Six years after the enactment of the ordinance, Americo Lopes acquired a lot zoned for a single-family residence but was located in a conservancy

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[31] *Id.* at 1229.

[32] *Id.*

[33] *Lopes*, 629 N.E.2d at 1313.

[34] *Id.*

district.[35] Mr. Lopes could not build a residence on his lot under the wetlands restrictions imposed.[36]

In fact, under the city ordinance, Mr. Lopes could make no use of his land. The lower court denied Mr. Lopes any relief despite the fact that the ordinance denied him the ability to make any economically viable use of his property.[37] On appeal, the Massachusetts Appeals Court concluded that "Lopes, who knew of the regulations when he bought the parcel, 'can hardly claim inverse condemnation.'"[38]

After this Court granted Mr. Lopes' petition for writ of certiorari and remanded the case, the Massachusetts Supreme Judicial Court ruled that Mr. Lopes, whose property was "subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction."[39] The Massachusetts court observed:

> A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.[40]

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[35] *Id.*

[36] *Id.* at 1313-14.

[37] *Id.*

[38] *Id.* at 1314.

[39] *Id.* at 1314-15.

[40] *Id.*

The New York court's doctrine does more than prevent Mrs. Kim from defending her property from physical invasions. It usurps essential ownership interests while promoting every one of the evils of which the Massachusetts court warned.[41]

### C. The New York Doctrine Is Inconsistent with the Conclusion of the New Jersey Courts That Property Rights Are Not Redefined Each Time Ownership Is Transferred

New Jersey has held the timing of land transfers and regulations to have no relevance to constitutionally protected ownership interests.

The Moroneys purchased an undersized lot which, under a preexisting zoning ordinance, was too small for a single-family house.[42] The Moroneys applied for a hardship variance which was denied.[43] A trial court concluded that, when the Moroneys were denied their hardship variance, there had been an inverse condemnation.[44]

The Borough appealed, arguing that the Moroneys were precluded from claiming a taking because they knew the lot was undersized when they bought it.[45] The New Jersey appeals court disagreed, holding that

> a right to relief possessed by the original owner passes to the successor in title. Such right is not lost simply because the succeeding owner bought

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[41] *But see Leonard v. Town of Brimfield*, 423 Mass. 152, 155, 666 N.E.2d 1300, 1303 (1996) (limiting the extent to which a landowner can claim takings damages for a preexisting regulation).

[42] *Moroney*, 268 N.J. Super. at 462, 633 A.2d at 1047.

[43] *Id.* at 1046.

[44] *Id.* at 1046-47.

[45] *Id.* at 1047-48.

> or contracted to buy with knowledge of the lot-size restriction.[46]

The New Jersey court concluded that property owners "stand in the shoes of their predecessors in title."[47]

Integral to this holding is the conclusion that ownership rights are not redefined each time property is transferred. Were Mrs. Kim's property located in New Jersey rather than New York, she would have had every constitutionally protected right that the previous owners of the land enjoyed.

### D. The New York Doctrine Conflicts with the Michigan Court's Conclusion That the Timing of a Regulation and the Transfer of Land Do Not Dictate When Just Compensation Will Be Required

Under the New York court's doctrine, Mrs. Kim has no remedy for the City's physical occupation of her property because she acquired it subject to the City Charter provision. However, the Michigan courts have rejected this unconstitutional doctrine.

J.F.K. Company owned land on which it wished to build.[48] A permit to develop the property was denied, based on a determination that approximately 28 acres of that parcel were protected wetlands. J.F.K. sued, seeking a ruling that the denial of the permit constituted a taking of its property.[49] The Michigan Court of Claims determined that there had been a taking of J.F.K.'s property because the denial of the permit application rendered the property worthless.[50]

The state challenged J.F.K.'s right to object to the application of the wetlands regulation because the company

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[46] *Id.* at 1048.

[47] *Id.*

[48] *K & K*, 217 Mich. App. at 58.

[49] *Id.*

[50] *Id.*

acquired title after enactment of the regulation. Citing *Nollan's* Footnote 2, the Court of Appeals rejected this argument.[51]

> [T]he passage of the [regulation] cannot be understood as depriving J.F.K. Company of just compensation merely because the WPA was in effect when the quit claim deed was executed. ... [T]he timing of the regulation and the transfer of the land do not dictate that plaintiffs are not entitled to just compensation.[52]

The state also claimed that the permit denial was based on a fundamental principle of Michigan property law, the preservation of wetlands.[53] The Court of Appeals, citing *Lucas*, disagreed, stating that even though the state had proffered the legislature's general declaration of policies, this did not transform the wetlands regulations into background principles of state law defining or limiting J.F.K.'s ownership interests in its land.[54]

Furthermore, the court observed that "[t]he decision to build a restaurant on land, or a request to fill in wetlands, do not constitute nuisances that the government may abate."[55]

Under the New York court's doctrine, the date on which property is acquired conclusively determines the ownership rights to which a landowner is entitled. Under the contrary holding of the Michigan court, constitutionally protected rights enjoyed by previous owners pass with the title to each new owner.

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[51] *Id.* at 64.

[52] *Id.*

[53] *Id.* at 63.

[54] *Id.* (citing *Lucas*, 505 U.S. at 1030-31(emphasis added)).

[55] *K & K*, 217 Mich. App. at 63.

**E. The Court of Appeals for the Federal Circuit Has Expressly Rejected the Doctrine Now Adopted by the New York Court That the Government, After the Creation of Property Interests, Can Redefine or Acquire Private Property Interests Without Regard to Limitations Under the Fifth Amendment**

Under the New York court's doctrine, Mrs. Kim has only those ownership interests which have not been previously legislated out of her bundle. The Court of Appeals for the Federal Circuit recently rebuffed similar attempts to deny the constitutionally protected rights of landowners, holding that the rights of owners of land are defined when the property interests are created and not by subsequent legislation or regulations.

The Preseaults own a tract of land on which they have a home.[56] Railroad rights-of-way ran on three parcels within this tract.[57] By their own terms, if the rights-of-way were no longer used for railroad purposes, the interests would revert to the owners of the underlying land. However, under the federal Rails-to-Trails Act, adopted in 1983, abandoned rights-of-way could be converted for use as public trails.[58] The Preseaults challenged the conversion under the Act of the right-of-way through their tract.[59]

The United States argued that the Preseaults' property interests in the tract were not defined when the railroad acquired its right-of-ways in 1899, but by the evolving enactment and implementation of law between 1899 and the dates the Preseaults acquired the land.[60]

The Federal Circuit Court of Appeals categorically rejected the thesis that general legislation enacted after the creation

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[56] *Preseault*, 100 F.3d at 1531.

[57] *Id.*

[58] *Id.* at 1524.

[59] *Id.* at 1536.

[60] *Id.* at 1537.

of the property interests "somehow redefined state-created property rights and destroyed them without entitlement to compensation."[61] Rather, the rights were defined by the original conveyances and remained unchanged notwithstanding subsequent regulatory enactments.[62]

Criticizing the government's reliance upon a few inapt quotations from *Lucas*, the court emphasized that the "background principles referred to by the Court in *Lucas* were state-defined *nuisance rules*."[63]

> Nothing in *Lucas* suggests that the background principles of a state's property law include the sweep of a century of federal regulatory legislation, and indeed much of what the Supreme Court said then, as well as in *Preseault II*, about property rights indicates to the contrary.[64]

The court concluded that the Preseaults could bring their takings claim, despite their having acquired the property after the implementation of the regulations.[65]

The Federal Circuit Court of Appeals observed that the timing of land use regulations and ownership are simply irrelevant to the question of whether a property owner can challenge the regulations as effecting a taking of property without payment of

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[61] *Id.* at 1530.

[62] *Id.* at 1537.

[63] *Id.* at 1538 (emphasis added).

[64] *Id.* at 1539.

[65] *Id.* at 1537. Furthermore, the court observed that "any property owner who was prescient enough to allege a regulatory taking following the enactment of the Transportation Act of 1920, in addition to having some doctrinal explaining to do, presumably would have been met by an equally prescient Government with the defenses of absence of ripeness and failure to exhaust administrative remedies." *Id.*

just compensation.[66] According to the court's understanding of *Lucas*, the relevant inquiry is what were the background principles of property and nuisance law in existence at the time an interest in property was created.

> Under the governing law of the State, the Preseaults, successors in title to those who owned the property when the easements were created, owned the same title and interest as they, and are entitled to the same protections the law grants.[67]

The federal court also reaffirmed that when the government physically occupies private property, the owner has an entitlement to compensation irrespective of any subjective expectations concerning the uses of land that will be permitted under existing regulations.

> The expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights.[68]

Rather, as this Court made clear in *Loretto*, the entitlement to compensation is historically rooted, an acknowledgment that when the government physically occupies private property, the dispossessed owner must be compensated.[69]

Under the holding in *Preseault*, Mrs. Kim, successor in title to those who owned the property before the City Charter provision was enacted, would have been entitled to challenge the City's invasion and receive just compensation under the Fifth Amendment's Taking Clause. Under the Federal Circuit Court of Appeal's decision, Mrs. Kim's ownership interest in her land was defined by background principles of property and nuisance law when the fee was created and not by subsequent enactments of City Charter provisions. Under the federal court's holding, the

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[66] *Id.* at 1540.

[67] *Id.*

[68] *Id.*

[69] *Id.* (citing *Loretto*, 458 U.S. at 441).

City, which did not have a right to physically occupy the land owned by Mrs. Kim's predecessors in interest, could not have invaded her land without incurring liability under the Fifth Amendment for having taken her property.

## II

## THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A DIRECT CONFLICT BETWEEN THE NEW YORK COURT OF APPEALS AND THIS COURT'S WELL-ESTABLISHED PHYSICAL TAKINGS DOCTRINE

### A. The New York Court's Doctrine, Under Which Mrs. Kim Could Not Prevent the City's Uncompensated Physical Invasion of Her Property, Conflicts with This Court's Determination That Permanent Physical Invasions of Private Property Are Categorical Takings

The New York court's holding that the City's permanent uncompensated physical invasion of Mrs. Kim's property does not violate the Takings Clause cannot be reconciled with this Court's doctrine that a permanent physical occupation of real property is invariably a categorical or *per se* taking.

More than 125 years ago, this Court held that the construction of a dam which permanently flooded private property constituted a taking:

> [*W*]*here real estate is actually invaded by super-induced additions of* water, ***earth***, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, *it is a taking*, within the meaning of the Constitution.[70]

Sixteen years ago, the New York Court of Appeals considered the question of permanent physical invasions in the context of cable television operations. The state court in that case held that a law that authorized cable television companies to install

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[70] *Pumpelly*, 80 U.S. at 181 (emphasis added).

equipment on private property did not constitute a taking for which payment of just compensation was required under the Fifth Amendment to the United States Constitution.

When this Court overruled the same court that now has permitted New York City to invade Mrs. Kim's land, it held that

> ***a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.***[71]

This Court observed this conclusion to be inevitable, noting that it had uniformly found such invasions to constitute a taking, "whether the action achieves an important public benefit or has only minimal economic impact on the owner."[72]

This principle has never been abandoned by this Court. Just recently, this Court in *Lucas* reemphasized that a permanent physical occupation of private property can never be permitted "no matter how minute the intrusion, and no matter how weighty the public purpose behind it," without payment of just compensation.[73]

Under the New York court's doctrine, the title to real property may be forcibly revised upon sale to transfer to the government the right of subsequent physical occupation without payment of just compensation. This doctrine results in uncompensated physical takings of private property, notwithstanding this Court's decisions precluding such a result.

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[71] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 425 (emphasis added).

[72] *Id.* at 435.

[73] *Lucas*, 505 U.S. at 1015.

### B. The New York Court's Doctrine, Under Which Mrs. Kim Does Not Have the Right To Be Compensated for the City's Physical Invasion of Her Property, Conflicts with This Court's Prior Determination That Landowners Do Not Lose Their Right to Compensation Under the Fifth Amendment by Prior Notice of the Existence of Land Use Regulations

The New York court held that Mrs. Kim never had the right to prevent the City's physical occupation of her property. App. A-14. It justified the City's extraordinary appropriation of the most fundamental of all ownership rights–the right to exclude–because Mrs. Kim purchased her land after the City Charter was enacted. Under the New York doctrine, when Mrs. Kim purchased her land, the City was able to seize without any cost to itself an easement on which it later dumped the fill.

However, in order for the court to permit the City's seizure of Mrs. Kim's land, it had to ignore long-standing principles applicable to constitutionally protected rights.

Property interests are defined by rules or understandings stemming from a source independent of the Constitution existing at the time the interests in property are created.[74] These rules and understandings form the basis of relationships between people and property. But if these relationships are made subservient to changing regulatory schemes, there would be nothing to prevent the virtual elimination of these protected private property interests. As Justice Holmes observed long ago:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. ... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification

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[74] *Lucas*, 505 U.S. at 1030.

> more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.[75]

This Court has stated more than once that a "State, by *ipse dixit*, may not transform private property into public property without compensation."[76] More recently, this Court has expressly held that ownership rights are not altered merely because property is acquired after a restrictive policy is implemented.[77]

In 1982, the California Coastal Commission, pursuant to a long-standing policy, demanded that owners of beachfront property grant an easement across their land in exchange for the commission's approval of the owners' rebuilding plans.[78] In *Nollan v. California Coastal Commission,* the property owners charged that this condition violated the Fifth Amendment's Takings Clause.[79] This Court held that the commission could not condition its grant of a permit on the dedication of a public easement across the property.[80]

Dissenting, Justice Brennan argued that the Nollans were aware that approval of their development would be conditioned on the forced dedication of an easement across their land.[81] However, the majority responded that the Nollans' rights were not "altered

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[75] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[76] *Lucas*, 505 U.S. at 1031 (citing *Webbs Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

[77] *Nollan*, 483 U.S. at 833 n.2.

[78] *Id.* at 828.

[79] *Id.*

[80] *Id.* at 834-35.

[81] *Id.* at 857 (Brennan, J., dissenting).

because they acquired the land well after the Commission had begun to implement its policy."[82]

In the case at bar, the New York court has chosen to reject the majority opinion in *Nollan*, instead adopting the view of the dissent. Compelled to "harmonize" the conflict the court has created by denying Mrs. Kim the fundamental right to keep the City off her land, the New York court suggests that this Court did not mean what was said in Footnote 2 of *Nollan*. App. A-7-8 n.3. According to the New York court, the City had an enforceable property interest–an easement–which it took when Mrs. Kim purchased her land. In contrast, the New York court declares the commission's policies in *Nollan* were mere unilateral claims of entitlement.

Unfortunately, the New York court does not provide explanations for problems that its novel interpretation of *Nollan* raises. Foremost is the question of how, if the City in this case had an easement, it could have been acquired without payment of just compensation to Mrs. Kim.

Under the New York court's doctrine, the Nollans could not have challenged the California Coastal Commission's demand that they acquiesce in the permanent physical invasion of their private beach, because the Coastal Act and policies were adopted long before they purchased their beachfront bungalow.

Under the New York court's doctrine, any regulation that could conceivably result in a taking of property would have to be challenged before affected land is transferred. Otherwise, the City acquires an interest in the land that forever precludes a claim for an uncompensated taking.

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[82] *Id.* at 833 n.2.

## III

## THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO PROVIDE NECESSARY UNIFORM GUIDANCE REGARDING KEY PRINCIPLES OF FEDERAL CONSTITUTIONAL LAW

This Court's opinion in *Lucas* should have signaled an end to government efforts to extinguish ownership rights by redefining the very property interests owned. Following *Nollan*, the right of a subsequent acquirer of property to challenge existing land use regulations should have been beyond question.[83] However, as the New York court's doctrine demonstrates, constitutionally protected rights remain vulnerable so long as a governmental entity, whether legislative or judicial, is determined to "force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[84]

The New York court's doctrine threatens to undermine fundamental protections guaranteed under the Fifth Amendment to the United States Constitution. This doctrine could legitimize unconstitutional land use regulations if they cannot be challenged by the preregulation owner of property; threaten market efficiency and the alienability of land; raise potentially insurmountable ripeness obstacles to property owners who might be faced with regulatory takings of their land; and discriminate between owners who acquired their land before restrictive regulations are adopted and those who take title afterwards.[85]

This Court should grant this petition for writ of certiorari to provide much needed uniform guidance regarding the basic, fundamental rights of property owners under the Fifth Amendment. This Court should reaffirm that no state may redefine "property" so as to deprive owners of the right to be free from

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[83] *See Nollan*, 483 U.S. at 833 n.2.

[84] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[85] *Lopes*, 629 N.E.2d at 1315.

permanent physical occupations of their land by the government without payment of just compensation.

## CONCLUSION

The New York court's doctrine extinguishes fundamental constitutional rights. It conflicts with the holdings of courts in at least four states, the Court of Appeals for the Federal Circuit, and this Court. The doctrine reduces to a nullity this Court's rule that permanent physical invasions are categorical takings for which just compensation must be paid. Only this Court can resolve the conflict created by the New York Court's doctrine. For the reasons stated above this petition for writ of certiorari should be GRANTED.

DATED: May, 1997.

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# APPENDIX

**APPENDIX A**

# State of New York
# Court of Appeals

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2 No. 8
Soon Duck Kim,
Appellants, *et al.*,
Plaintiffs,
v.
City of New York,
Respondent, *et al.*,
Defendants.

## OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Richard S. Graver, for appellants.
Jane L. Gordon, for respondent.

CIPARICK, J.:

In 1990, the City of New York regraded a public road in Queens. To maintain lateral support between the road and plaintiffs' property, the City placed side fill on the portion of plaintiffs' property abutting the roadway. In this lawsuit, plaintiffs contend that they are entitled to compensation for the portion of their property taken by the City. We disagree.

Plaintiffs acquired their property with constructive notice that the property abutted a public road that was below the legal grade. In regrading the road and raising a portion of plaintiffs' property up to the legal grade, the City acted pursuant to a longstanding common-law principle and in conformity with a provision of its Charter that was in force when plaintiffs acquired title to their property. Therefore, we conclude that the City did not take any property interest from plaintiffs for which compensation is due.

I.

In June 1978, the now-defunct New York City Board of Estimate raised the legal grade of a section of College Point Boulevard in Queens from 9.1 to 13.5 feet. In October 1978, a map reflecting that legal grade was properly filed in the office of the Queens Borough President. Ten years later, plaintiffs purchased a parcel of property on College Point Boulevard, on which they currently operate a car wash and lease space to an auto repair shop. When plaintiffs purchased the property, the grade of their parcel was more than 4 feet below the legal grade. Plaintiffs had constructive notice of this feature by virtue of the filed map.

As part of a public construction project on College Point Boulevard in 1990, the City undertook to raise the roadway to its legal grade. In March of that year, the City's Department of Transportation gave plaintiffs written notice of the plan to raise College Point Boulevard to the previously established legal grade and advised plaintiffs of their obligation under the City Charter to raise their property to the legal grade (*see*, NEW YORK CITY CHARTER §2904[2]). The notice informed plaintiffs that the City would regrade the property at no cost to them upon receiving their consent within ten days, but that if consent was not timely received, the City was authorized to do the work itself and seek reimbursement for its cost from plaintiffs. Plaintiffs failed to respond to the notice.

The City regraded the relevant portion of College Point Boulevard in June 1990. On account of the nearly five-foot disparity between the legal grade of College Point Boulevard and the lower grade of plaintiffs' property, the Department of Transportation raised plaintiffs' property to the legal grade by placing side fill on 2390 square feet of plaintiffs' property abutting the public roadway. It is undisputed that the side fill was necessary to support the street and prevent erosion.

Plaintiffs had previously commenced this action in February 1990, alleging, among other things, that the City's regrading project would work an unconstitutional taking of their property without just compensation.[1] Plaintiffs moved and the City cross-moved for summary judgment on the takings claim. Supreme Court denied plaintiffs' motion and granted the City's cross-motion, concluding that because the City was authorized by New York City Charter §2904 to compel plaintiffs to raise their property to the legal grade, no taking had occurred. The Appellate Division affirmed. After the parties stipulated to discontinue all causes of action other than the takings claim, we granted leave to appeal and now affirm.

II.

Plaintiffs contend that the City's action in placing side fill on almost 2400 square feet of their property constitutes an unconstitutional taking of a portion of their property without just compensation. In support of this contention, plaintiffs invoke the rule that any government-authorized "permanent physical occupation" of property is a taking, no matter how small the area occupied and without regard to the public interest served by the government's action (with the magnitude of the occupation factoring only into the amount of compensation due) (*see*, *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-428). If this case involved simply the City's dumping of side fill on 2400 square feet of plaintiffs' property, we might well agree with plaintiffs and the dissent, and conclude that there was a taking (see, *Pumpelly v Green Bay Co.*, 13 Wall [80 US] 166, 181 [taking found where water

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[1] Apart from the takings claim, plaintiffs asserted a cause of action against the City for interference with their business and sought to enjoin the City from regrading the road. In addition, plaintiffs asserted a cause of action against the prior owners of the property and the prior owners' attorneys for fraudulent misrepresentations in connection with the sale of the property. The only cause of action at issue on this appeal is plaintiffs' takings claim against the City.

overflow from dam permanently flooded landowner's property]; *Matter of Cheesebrough*, 78 NY 232, 238 [taking found where City constructed permanent drain on landowner's property]; *but cf.*, *Loretto*, *supra*, 458 US, at 440 n19). However, that is not this case. We conclude instead that, by virtue of the common-law and City Charter obligation of lateral support to a public roadway, plaintiffs' title never encompassed the property interest they claim has been taken.

Central to the analysis of the issue on appeal is the settled proposition that "property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" (*Board of Regents v Roth*, 408 U.S. 564, 577). Because the State defines the rights and obligations that constitute "property" in the absence of any superseding federal law, the threshold step in a takings inquiry is to determine whether, in light of the "existing rules or understandings" of State law, plaintiffs ever possessed the property interest they now claim has been taken by the challenged governmental action (*Lucas v South Carolina Coastal Council*, 505 U.S. 1003, 1030 [quoting *Roth*, *supra*, 408 US, at 577]). As explained by the Supreme Court in *Lucas*, the purpose of this "logically antecedent inquiry into the nature of the owner's estate" is to determine whether the allegedly taken property interest was a stick in the "bundle of property rights" acquired by the owner (505 US, at 1027, *supra*). Only if the claimed property interest inhered in the owner's title does the court proceed to determine whether the challenged governmental action works a compensable taking of that property interest (*see*, *e.g.*, *Penn Central Transp. Co. v New York City*, 438 U.S. 104, 123-125).

A threshold inquiry into an owner's title is generally necessary to the proper analysis of a takings case, whether of a regulatory or physical nature (*see*, *Lucas*, *supra*, 505 US, at 1028 ["Where 'permanent physical occupation' of land is

concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved, *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S., at 426--though we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title"]). Thus, regardless of whether this case is characterized as a physical or regulatory taking, a question we do not reach,[2] our analysis starts with a search into the bundle of rights and concomitant obligations contained in plaintiffs' title.

It has been suggested that this "logically antecedent inquiry" into the owner's title should be limited to a review of those property and nuisance rules recognized at common law, and that statutory law should not factor into the analysis (*see, e.g., K&K Constr., Inc. v Department of Natural Resources*, 217 Mich App 56, 63-64; Kmiec, *At Last, The Supreme Court Solves The Takings Puzzle*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* [Callies ed.], at 110-112). Some confusion in this respect stems from the Supreme Court's emphasis on the nuisance doctrine in *Lucas* to illustrate the type of background restriction of State law that would inhere in a property owner's title (*see, e.g., Lucas, supra*, 505 US, at 1029 [property owner's title

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[2] Insofar as plaintiffs' real grievance is with the City's regulation requiring the maintenance of lateral support to the roadway, the issue might be characterized as a regulatory rather than a physical taking. Although the City physically placed the side fill on plaintiffs' property, it did so only after plaintiffs refused to discharge their obligation under the City Charter to do the work (*see*, NEW YORK CITY CHARTER §2904[2]; *accord, Hoeck v City of Portland*, 57 F3d 781, 787 [9th Cir] [City's demolition of structure on plaintiff's property "was not a physical taking for public use . . . , it was a restriction on the use of the property to maintain an abandoned structure"], *cert denied* 116 S Ct 910). Moreover, the property owner, not the City, continues to own the area containing the side fill, and the owner can do whatever it likes to that area as long as lateral support to the roadway is maintained (see, *Loretto, supra*, 458 US, at 440 & n19).

contains the restrictions on use that "could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally"]). However, we do not think that this aspect of the *Lucas* opinion should be read so narrowly.

Given the theoretical basis of the logically antecedent inquiry--namely, "the State's power over . . . the 'bundle of rights' that [property owners] acquire when they obtain title" (*Lucas*, *supra*, 505 US, at 1027)--we can discern no sound reason to isolate the inquiry to some arbitrary earlier time in the evolution of the common law. It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the pre-existing rules of State property law, while ignoring statutory law in force when the owner acquired title (*accord*, *Hunziker v Iowa*, 519 NW2d 367, 371 [Iowa] [no taking when statutory restriction on use of land was in effect when plaintiffs acquired title], *cert denied* 115 S Ct 1313; *Grant v South Carolina Coastal Council*, 461 SE2d 388, 391 [SC] [same]). To accept this proposition would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law (*see*, *e.g.*, *Gombert v McKay*, 201 NY 27, 30). As the Supreme Court has aptly observed:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself . . . may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to

the changes of time and circumstances" (*Munn v Illinois*, 94 U.S. 113, 134).

The *corpus juris* of this State comprises constitutional law, statutory law and common law. To the extent that each of these sources establishes binding rules of property law, each plays a role in defining the rights and restrictions contained in a property owner's title. Therefore, in identifying the background rules of State property law that inhere in an owner's title, a court should look to the law in force, whatever its source, when the owner acquired the property (see, *Gazza v New York State Dept. of Environmental Conservation*, NY2d [decided today] [enforcement of pre-existing statutory wetlands restriction not a taking]; *Matter of Anello v Zoning Board of Appeals of Village of Dobbs Ferry*, NY2d [decided today] [enforcement of pre-existing steep-slope ordinance not a taking]).[3] In this case,

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[3] We acknowledge the language in the Supreme Court's opinion in *Nollan v California Coastal Commn.* (483 U.S. 825, 833 n2) indicating that the regulatory restriction in that case did not inhere in the plaintiffs' title even though plaintiffs had constructive notice of the restriction when they acquired the property. However, we think the *Nollan* footnote is readily harmonized with the "logically antecedent inquiry" subsequently elucidated in *Lucas* (*see generally*, Mandelker, *Investment-Backed Expectations In Takings Law*, in TAKINGS, *supra*, at 135-138 [concluding that the *Nollan* footnote should not be understood as prohibiting inquiry into pre-existing statutory or regulatory restrictions]). Specifically, the property interest allegedly taken in *Nollan* was not subject to any pre-existing restriction; rather, the case centered on a state agency's policy of conditioning the grant of building permits on the property owner's surrender of a public easement over the beachfront property (see, id.). Because plaintiffs' predecessors in interest had neither applied for nor been granted the conditioned permit, the government's interest in the easement was, at the time of plaintiffs' acquisition of the property, a mere "unilateral claim of entitlement," not an enforceable property interest (*id.* [emphasis added]). There was simply no existing title restriction which a purchaser took subject to in that case. We believe that a different situation would have been presented in *Nollan*, and a different result compelled under *Lucas*'s "logically antecedent inquiry," if

(continued...)

we find applicable rules in the common law and in New York City's Charter.

III.

Plaintiffs' obligation to preserve and maintain the legal grade has its roots in New York's common-law obligation of lateral support. In *Village of Haverstraw v Eckerson* (192 NY 54), the Court discussed this obligation and distinguished between the lateral-support obligations of adjoining private landowners and the lateral-support obligation of a private landowner abutting a public roadway, noting that the landowner's duty with respect to the public roadway "will be somewhat broader" than the duty owed to an adjoining private landowner; indeed, the obligation was said to run in only one direction--" the municipality is not under a similar obligation to the abutting owner" (*id.*, at 59).[4] Elaborating on the broad scope of this duty, the Court explained that "the preservation of lateral support to a highway as constructed and prepared for the public use is an obligation to the community which rests upon the adjacent landowner. It is an absolute right of the public, in the maintenance of which the members of the community are concerned" (*id.*; see also, 1 Rasch, NEW YORK LAW AND PRACTICE OF REAL PROPERTY §20:23, at 616 [2d ed] ["the fee

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[3] (...continued)
the property was already subject to a conditioned permit when plaintiffs acquired it.

[4] Under current law, the City provides a limited claims procedure for actual physical damage caused by its regrading projects (see, NEW YORK CITY ADMIN CODE §§3-316 to 3-320). Specifically, recovery is limited to change-of-grade damages to pre-existing buildings or improvements (*see*, ADMIN CODE §3-318[a]). In March 1991, plaintiffs filed a notice of claim with the City pursuant to this provision, the outcome of which is not contained in the record. Nevertheless, insofar as the issue on appeal relates to the separate question of lateral support, which is addressed elsewhere in the City Charter and Administrative Code, this claims procedure is inapposite.

owner of land abutting on a highway is under an obligation to preserve the lateral support to a public highway"]).

The dissent's reliance on authorities discussing the separate and narrower obligation owed to a neighboring private landowner is misplaced (*see*, Dissent, at 12 [citing RESTATEMENT (SECOND) OF TORTS §817; 1 AM JUR 2d, Adjoining Landowners §40]). For example, the rule that the obligation of lateral support only prohibits "the withdrawal of the support of any land naturally necessary to maintain another's land in its natural condition" (Dissent, at 12) does not apply when a public roadway is involved. As explained in one treatise: "An exception to the general rule that the absolute right of support extends only to the land in its natural state occurs when the supported land is an adjacent public highway. The duty to provide lateral support includes the duty to support the highway in its improved condition. The courts have held that the public interest in highways justifies the enlargement in the scope of duty" (9 Powell, REAL PROPERTY P 699[1], at 63-6 [emphasis added]).

Nevertheless, we need not define the precise contours of the common-law duty in this case, because the property owner's obligation of lateral support to a public roadway finds its specific, contemporary formulation in the New York City Charter, which provides:

> "The owner of any property at his own cost, shall . . . fill any sunken lot or lots comprising part or all of such property or cut down any raised lot or lots comprising part or all of such property whenever the transportation department shall so order pursuant to . . . section 19-152 of the administrative code of the city of New York. In the event that the owner fails to comply with the provisions of this section, the transportation department may provide for the doing of same at the expense of the owner in the manner to be provided by local law and

section 19-152 of the administrative code of the city of New York" (NEW YORK CITY CHARTER §2904[2]).

Under this section, the property owner's obligation to "fill any sunken lot" is juxtaposed with the related obligation to "cut down any raised lot" (NEW YORK CITY CHARTER § 2904[2]). Together, these provisions embody the rule that the landowner must maintain lateral support to the roadway. According to the dissent, however, property can only be considered "sunken" when "something has happened to the lot in question which might . . . require repair," and, therefore, a property owner's City Charter obligation to raise the property is not triggered "when it is the City that has caused the disparity" (Dissent, at 11, 15). We do not construe the statute so narrowly and conclude that section 2904 applies to this case because the City raised the roadway up to the legal grade that was established before plaintiffs acquired their property.

While acknowledging that one accepted meaning of the term "sunken" is "situated or lying on a lower level," the dissent contends that section 2904 contemplates only the "primary meanings" of the term, which are "having sunk or been sunk beneath the surface" and "having sunk to a lower level" (Dissent, at 10 [quoting RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1339 (1991)]).[5] However, in view of its juxtaposition with the term "raised," we believe the term "sunken" has the more general meaning of "situated or lying on a lower level" (*see also*, WEBSTER'S NEW WORLD DICTIONARY 1427 [2d ed] ["sunken" defined as "below the level of the surrounding or adjoining area"]). This definition, considered in light of the broad common-law obligation of lateral support to

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[5] We note that another dictionary first defines "sunken" as "submerged, especially: lying at the bottom of a body of water" (*see*, Merriam-Webster's Collegiate Dictionary 1180 [10th ed]). Of course, the term "sunken" as used in section 2904 does not mean underwater, but has the meaning that best comports with its statutory context and purpose.

a public roadway, supports the conclusion that a "sunken" lot, for purposes of section 2904, is one that is below legal grade. Moreover, this construction best serves the statutory purpose of supporting the roadway and protecting it from erosion, as well as abating the substantial safety hazard posed by drop-offs between the roadway and abutting properties.

The applicability of section 2904's lateral-support obligation to the facts of this case--where a property owner acquires property on notice of a legal grade different from the existing grade--is illustrated by this Court's analysis in *Laba v Carey* (29 NY2d 302, 311-312). In *Laba*, the Court addressed the marketability of title of a property on which the existing grade of the public sidewalk was lower than the legal grade. Rejecting the purchaser's argument that this defect rendered title unmarketable, the Court explained in a particularly instructive passage:

> "Although there is no present violation, respondents contend that they may be required in the future to raise the level of the sidewalk. *This is nothing more than a normal incident to the ownership of real property within the City of New York.* Section 230 of the New York City Charter [the predecessor provision to section 2904] places the responsibility for the maintenance and repair of sidewalks on the individual owner. This must be done in accordance with such specifications as may be prescribed by the Transportation Administration. Thus, if title is unmarketable here, then so is all property similarly situated within the city. This is manifestly not so" (29 NY2d, at 312, *supra* [emphasis added]).

In this case, the City Charter obligation of lateral support to the legal grade of a public roadway--"a normal incident to the ownership of real property within the City of New York" (*Laba*, *supra*, 29 NY2d, at 312)--was in force when plaintiffs bought their property. In addition, plaintiffs acquired their

property with constructive notice that the existing grade was below the legal grade, which had been duly established by the filing of a revised city map in accordance with statutory procedure (see, NEW YORK CITY ADMIN CODE §25-101 ["The city map is to be deemed final and conclusive with respect to the location, width and grades of the streets shown thereon, so far as such location, width and grades have been duly adopted"]).

Thus, plaintiffs acquired a "sunken lot" insofar as it was below the legal grade of the road and, accordingly, took the property subject to the section 2904 obligation to raise it to the legal grade (*see*, *Trubia v Koch*, NYLJ, Aug. 15, 1979, at 13, *affd* 87 AD2d 742).[6] Moreover, plaintiffs were on notice that if they failed to discharge their obligation, the City could perform the work at their expense and on the public's behalf. Plaintiffs' deliberate noncompliance with this obligation cannot be converted into their present takings claim (see, *Hoeck v City of Portland*, 57 F3d 781, 787, *supra* [no taking when City entered plaintiff's property to demolish abandoned structure: "if Hoeck had obeyed the City's order to repair the structure . . ., it would

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[6] The dissent's contention that "an easement on plaintiffs' property was not created when the City filed the map raising the legal grade of the street" (Dissent, at 17) is beside the point since the filing of the revised map "finally and conclusively" established a higher legal grade (NEW YORK CITY ADMIN CODE § 25-101). Whether denominated an easement, a servitude or simply a restriction on title, plaintiffs took their property subject to the City Charter obligation requiring lateral support to the previously established legal grade. The dissent's related assertion that "until the City actually raised the grade of the street, . . . it would have been impossible to determine the extent" of any taking (Dissent, at 18) is similarly misdirected given that plaintiffs' property interests "are defined by those state laws enacted and in effect at the time [plaintiffs] took title and they are not dependent on the timing of state action pursuant to such law" (*Gazza*, *supra*, __ NY2d, at __ ).

not have been necessary for the City to enter his property to enforce its regulations"]).[7]

The thrust of the dissenting opinion is that the City did not meet its burden to demonstrate that City Charter §2904 applies to this case (see, Dissent, at 11, 14, 16-17). Even assuming that plaintiffs demonstrated a prima facie takings claim by showing that the City added side fill to their property, the City clearly discharged its burden to rebut plaintiffs' case by establishing that, pursuant to section 2904, plaintiffs never owned the property interest they claim was taken (*see*, *Lucas*, *supra*, 505 US, at 1031-1032). The City relied on section 2904 at each phase of this action and brought to each court's attention the 1979 case of *Trubia v Koch*, in which Supreme Court held and the Appellate Division affirmed that section 2904 applies when a landowner acquires property that is below the legal grade (see, *Trubia*, *supra*, at 13 ["Under the statutory authority, instead of placing the fill on petitioners' property at its own expense, the City could have compelled the petitioners, at their own expense, to fill the property to legal grade"]).

We are mindful of the concern expressed by the dissent that government might attempt to proffer novel interpretations of State law to justify what would otherwise amount to an unconstitutional taking. To guard against this possibility, the Supreme Court explained that only those rules derived from an "objectively reasonable application" of pre-existing State law can be said to inhere in a property owner's title (*see*, *Lucas*, *supra*, 505 US, at 1032 n18).[8] Thus, while the dissent might

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[7] If plaintiffs had purchased the property at the legal grade, and the City thereafter raised the legal grade of the roadway, a different takings question might be presented.

[8] Although the Supreme Court made this observation in discussing a court's application of common-law nuisance doctrine (while disavowing reliance on the legislature's stated general justification for newly enacted "confiscatory"

(continued...)

plausibly disagree with the Court's interpretation of section 2904, its concession that the statute "is amenable to two differing yet reasonable interpretations" (Dissent, at 11) forecloses its contention that the application of the statute in this case works a taking of plaintiffs' property.

Finally, when plaintiffs purchased the property, an inquiry would have revealed the disparity between the existing grade and the previously established legal grade. Plaintiffs' potential lateral-support obligation, then, presumably would have been factored into the purchase price of the property.[9] Consequently, if plaintiffs were to succeed on their takings claim, they could receive the windfall of initially receiving a reduction in the purchase price on account of this obligation and subsequently receiving compensation when the obligation is enforced. Such a result is inconsistent with the basic purpose of takings law, which is to protect the private landowner from unfair fiscal burdens that should be shared by the public as a whole (*see*, *Armstrong v United States*, 364 U.S. 40, 49), not to enrich the landowner at the public's expense.

In sum, we conclude that the lateral-support obligation imposed on plaintiffs was a prevailing rule of the State's property law when they acquired their property and, accordingly, encumbered plaintiffs' title and the constituent bundle of rights. The City's enforcement of this legal obligation

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[8] (...continued)
laws), this proposition should extend to judicial interpretation of any pre-existing State law for the same reasons explained above that the threshold inquiry into title should not be limited to nuisance law.

[9] Plaintiffs paid $ 800,000 for the property, and it is unclear whether this purchase price actually included an adjustment for the lateral-support obligation. In their complaint, plaintiffs alleged that the prior owners of the property deliberately failed to tell them of the City's plan to raise the street to its legal grade. Whatever the merits, this sort of claim is properly asserted against other parties to the transaction, not against the City of New York in the guise of a takings claim.

therefore does not constitute a taking of any property interest owned by plaintiffs for which they are entitled to compensation. When plaintiffs acquired title to their property in 1988, they acquired ownership of the entire parcel, including the portion abutting the public roadway, subject to the obligation to maintain lateral support to the roadway's legal grade. Today, plaintiffs still own the entire parcel, including the portion abutting the roadway, subject to the obligation to maintain lateral support to the roadway's legal grade. The only difference between then and now is not that a property interest has been taken, but that the pre-existing lateral-support obligation has been enforced by the City itself because plaintiffs refused to do so.

Accordingly, the judgment appealed from and order of the Appellate Division brought up for review should be affirmed, with costs.

Judgment appealed from and order of the Appellate Division brought up for review affirmed, with costs. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Bellacosa and Levine concur. Judge Smith dissents and votes to reverse in an opinion in which Judge Wesley concurs. Judge Titone took no part.

February 18, 1997, Decided

SMITH, J. (dissenting):

When the city put side fill on plaintiffs' property to shore up a roadway, it took their property for public use and plaintiffs are entitled to be compensated for the taking. Contrary to the instant interpretation of the majority, neither the New York City Charter nor the common law is a pre-existing limitation on plaintiffs' title that would authorize a taking of plaintiffs' property without compensation. I, therefore, dissent.

Under the reasoning of the majority, plaintiffs must suffer "the City's dumping of side fill on 2400 square feet of plaintiffs' property" (maj op at 4) solely to create additional lateral support that will "protect" and "maintain" an artificially-created roadway dedicated to the public. The majority finds the physical invasion complained of to be permissible under §2904 of the New York City Charter and as an extension of a landowner's obligation to provide such support for public roadways.

In 1978, the Board of Estimate raised the legal grade of College Point Boulevard from 9.1 to 13.5 feet. A portion of that public roadway abutted a lot at 31-25 College Point Boulevard. Plaintiffs purchased that lot in 1988. Because a map reflecting the legal grade had previously been duly filed in the office of the Queens Borough President, plaintiffs were on constructive notice that their property was approximately 4.5 feet short of the legal grade of the adjacent roadway.

In 1990, work finally began to regrade the roadway. Construction on the street included installing a new sewer system and water main. In March 1990, plaintiffs filed the instant action against the City alleging that due to the "reconstruction of street" abutting their property, "the highest and best use of the property has been diminished resulting in a taking" by the City. Later that same month, following completion of the sewer system and water main installation, the City's Department of Transportation ("DOT") requested plaintiffs' "consent" to "permit the placing and sloping" of side fill on plaintiffs' property to "protect" and "maintain" the street (A43).[1]

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[1] Specifically, the notice read as follows:

This Department intends to improve to its legal grade the street abutting your property. This will result in the raising of the street elevation approximately 5.0' feet, subject to modification. To protect the street against

(continued...)

Although DOT offered to perform the construction at no charge if consent were timely returned, DOT warned that it would proceed even without consent, "the cost of which shall be due and payable and shall constitute a lien against your property." The notice stated that plaintiffs would "be responsible for the removal and relocation of landscaping, fences, walks, stairs and other structures, whether or not they are attached to a building, which may be disturbed due to fill operations." The notice further provided that any consent to the placement of side fill on plaintiffs' property "in no way constitutes a waiver of or release from your obligation to construct and/or maintain the sidewalk abutting your property pursuant to Sections 2903 & 2904 of the New York City Charter." Plaintiffs never responded to the notice.

The regrading of the roadway began in June 1990. Rather than leave an almost five-foot disparity between the lower grade of plaintiffs' property and the neighboring roadway, the

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[1] (...continued)
the resulting lower grade of your property and to maintain the street at legal grade requires that side fill be placed on your property.

Your consent to permit the placing and sloping of such side fill by the Department of Highways or its agents is requested. Please sign and send one copy of the accompanying "CONSENT" form to this office in the enclosed stamped self-addressed envelope within ten (10) days from the date stamped on the return receipt. Retain the second copy for your records.

There will be no charge to you for the placing and sloping of side fill on your property if the return of the signed form is timely. You, however, will be responsible for the removal and relocation of landscaping, fences, walks, stairs and other structures, whether or not they are attached to a building, which may be disturbed due to fill operations. The within consent in no way constitutes a waiver of or release from your obligation to construct and/or maintain the sidewalk abutting your property pursuant to Section 2903 & 2904 of the New York City Charter.

In the event we do not receive the consent within the said ten (10) days, you may be required to fill your lot abutting the street to legal grade at your own cost. Upon your failure to do so, this Department may fill your lot to legal grade, the cost of which shall be due and payable and shall constitute a lien against your property.

DOT proceeded to dump side fill on that portion of plaintiffs' property that abutted the roadway (about 2,390 square feet) until the two were level. The DOT also built permanent driveway ramps from College Point Boulevard to plaintiffs' property which provided greater roadway access. The driveway ramps were built at no cost to plaintiffs. Following the regrading project, plaintiffs filed a notice with the New York City Comptroller for a "claim for damages by reason of a change in grade" pursuant to Title 3, Section 3-316 through 3-320 of the New York City Administrative Code.

The plaintiffs moved for summary judgment and an order directing an immediate trial on damages on the takings claim against the City. The City cross-moved for summary judgment in its favor. Supreme Court denied plaintiffs' motion but granted the City's cross-motion and dismissed the plaintiffs' claim. In so holding, the court stated that plaintiffs' claim must fail because "the City could have compelled plaintiffs to fill the property to legal grade at their own expense pursuant to New York City Charter §2904."

The Appellate Division affirmed and held that the side fill did not constitute a "permanent physical occupation" and plaintiffs' property rights "were not effectively destroyed by the City's actions." The Appellate Division held that no taking had occurred because "the fill was necessary to support the street and prevent erosion, and there is no evidence that the placement of the fill had an impact on the plaintiffs' business or their use of the property."

In affirming the order of the Appellate Division, a majority of this Court adopts the reasoning of Supreme Court and holds that "the City did not take any property interest from plaintiffs for which compensation is due" because the "City acted pursuant to a longstanding common-law principle and in conformity with a provision of its Charter that was in force when plaintiffs acquired title to their property" (maj op at 2).

Contrary to the view of the majority, the placing of side fill on the plaintiffs' property constituted a taking of private property for public use which requires compensation. Moreover, neither the common law nor section 2904 of the New York City Charter supports the argument of the majority.

In *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, the plaintiff filed a taking claim against the placement of cable television equipment on her roof pursuant to a statute which provided that "a landlord may not 'interfere with the installation of cable television facilities upon his property or premises'" (458 U.S. at 423). The Court found in favor of the plaintiff. However, the Court distinguished the "permanent physical occupation" by the cable equipment in that case from permissible regulations affecting a property owner such as the requirement to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers and the like.

Respondents argue that the "lateral support" obligation here falls within the latter category of permissible regulations. However, the regulations described by the *Loretto* Court are all directed toward the public safety and health of those persons invited to the landowner's property by the landowner. They do not benefit the public at large. In the present case, the plaintiffs' personal property and obligations are dedicated to the public benefit without regard to plaintiffs' property interests. Indeed, the *Loretto* Court recognized this distinction when it stated that the statute at issue there "might present a different question" if it required landlords to provide cable installation if a tenant so desired (458 U.S. at 440, n. 19).[2]

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[2] Moreover, the flexibility envisioned by the "different question" is not available to the plaintiffs here since dirt filling 2400 square feet of a delineated area offers little room for plaintiffs' input or modifications. Although the plaintiffs may use the dirt deposited on their property, they are necessarily denied dominion over their property beneath the side fill. That

(continued...)

Importantly, the *Loretto* Court reiterated the rule that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve" (458 U.S. at 426). The longstanding application of this rule is undeniable. In 1879, this Court stated that "there never can be any necessity under the police power or the law of necessity to permanently appropriate land to the public use without compensation" (*Matter of Cheesebrough*, 78 NY 232, 237). More recently, the Supreme Court stated that "in general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation" (*Lucas*, 505 U.S. 1003, 1015).

In *Matter of Cheesebrough* (78 NY 232), a property owner charged that newly enacted legislation to provide for proper drainage of lands within New York City was unconstitutional because the law made no provision for compensating the owners for the land taken for the "acquisition of an easement" in lands for the construction and maintenance of drains. This Court agreed and stated:

> It was a work not so much necessary for the lands of the petitioner as for other lands requiring drainage through his. It is believed that no case can be found justifying the permanent appropriation of land without compensation under such circumstances. The statute ... did not and no statute could confer authority to construct this drain through the land of the petitioner without his consent and without compensation to him for the land taken (id. at 238)

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[2] (...continued)
area is occupied, and permanently so. Furthermore, a permanent physical taking may occur regardless of the size of the area occupied or the *de minimis* impact the taking has on the owner's use of the rest of his land (*Loretto*, *supra*, at 430).

Such is the rule even where the legislation "did not deprive the owner of the fee and gave the public but an easement" (*People ex re. Williams v Haines*, 49 NY 587, 590; *see also People v Nearing*, 27 NY 306).

Although government may not decree land anew such that a permanent physical occupation may be sustained without compensation, the Supreme Court has noted that government may assert a "permanent easement that was a pre-existing limitation upon the landowner's title" (*Lucas*, 505 U.S. 1028; see also *Gazza v New York State Dept. of Environmental Conservation*, NY2d [decided herewith]). Clearly, a "pre-existing limitation" may not be based upon subsequently enacted legislation or novel interpretations of state law (*see Lucas*, 505 U.S. at 1029 ["Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership"]).

Obviously, the placement of enough side fill across 2400 square feet of plaintiffs' land to raise it almost five feet higher is a physical invasion. Moreover, there can be no argument that the invasion is temporary in any way. Thus, the placing of side fill on the plaintiffs' property constituted a taking. Accordingly, under the guidance of *Lucas*, the circumstances presented here may only be validated without compensation if respondent can show that a "pre-existing limitation" upon plaintiffs' title may be found in state law (505 U.S. at 1031).

In *Lucas*, the Supreme Court advised that a showing of "background principles" of property law that may create such a pre-existing limitation upon title must stem from more than "the conclusory assertion" of "a common law maxim such as *sic utere tuo ut alienum non laedas*" (505 U.S. at 1031; *see* BLACK'S LAW DICTIONARY, at 1380 ["one should not use his property in such a manner as to injure that of another"]). Contrary to the instruction of the Supreme Court, the majority

holds that a newly expanded obligation under that same common law principle provides a basis for validating the permanent physical occupation at issue here.

Neither New York City Charter §2904 nor the common law supports the argument of the majority. Section 2904 devolves from §230 which became part of the City Charter in 1962. The two sections, 2904 and 230, do not differ in any material respect. What is significant is that the legal grade of the street was changed in 1978, well after the enactment of §230. In other words, when §230 became law, there was no indication that it would be applied to require a private property owner to shore up this or any other public roadway.

Section 2904 of the City Charter defines certain landowner obligations under the auspices of the transportation department such as maintaining sidewalks. Whether the statute is truly the "contemporary formulation" of the common law lateral support obligation as noted by the majority is certainly open to debate (see, e.g., *City of Rochester v Campbell*, 123 NY 405, 412 [no obligation to repair streets or sidewalks rests upon lot owners at common law]; *Village of Fulton v Tucker*, 3 Hun 529, 531-32 ["The owner of adjoining territory has no greater duty in regard to keeping sidewalks in repair, than he has in regard to other parts of the highway"]). Moreover, the statute does not address the circumstances here. The provision reads, in relevant part:

> Duties and obligations of property owner with respect to sidewalk flags, fencing of vacant lots and filling of sunken lots or cutting down of raised lots. The owner of any property at his own cost, shall ...
>
> (2) fence any vacant lot or lots comprising part or all of such property and fill any sunken lot or lots comprising part of all of such property or cut down any raised lot or lots comprising part or all of such property whenever the transportation department shall so order pursuant to standards and policies of the transportation

> department and section 19-152 of the administrative code of the City of New York. In the event that the owner fails to comply with the provisions of this section, the transportation department may provide for the doing of same at the expense of the owner in the manner to be provided by local law and section 19-152 of the administrative code of the city of New York.

The plain language of Section 2904 refers to "sunken" lots.[3] The majority's position necessarily hinges upon an interpretation of this term. While "sunken" may mean "situated or lying on a lower level," its primary meanings are listed as "having sunk or been sunk beneath the surface" or "having sunk to a lower level" (RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY at 1339 [1991]). The Second Edition of the Oxford English Dictionary provides several definitions of the word, only two of which are relevant. One definition is "that has sunk below the usual or general level, subsided" (*see* 17 OXFORD ENGLISH DICTIONARY at 197 [2d ed]). Another meaning is given as "In modern technical use, applied to a surface area lowered, or to an object let in, so as to lie below the general surface, or to work of which depression of level is a general feature." Clearly, plaintiffs' land may not be characterized as "sunken" under the latter definition. Thus, the primary definition of the word "sunken" implies that something has happened to the lot in question which might therefore require repair (*see Italian Savings Bank v Le Grange*, 169 AD 120, 125 ([referring to "low and swampy ground" which new

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[3] Although not dispositive, it should be noted that only the obligation to repair sidewalks under section 2904 is referred to in the notice sent to plaintiffs in March 1990 by the DOT. The DOT notice contains no cited authority, statutory or otherwise, for which plaintiffs would have an obligation to raise their property to the level of the roadway.

purchasers filled as "sunken lots"]). Such a reading comports with the traditional lateral support obligation.[4]

The reference to "sunken lots" is amenable to two differing yet reasonable interpretations. Notably, the majority fails to offer a shred of legislative history to support its interpretation of this ambiguous phrase. Instead, the majority offers a meaning that is inconsistent with the same common law principle which the majority contends is the root of the provision itself. Under *Lucas*, the respondent must offer some specific support, from any source whatsoever, that the City Charter has ever been applied in this manner. No such evidence comes from respondent, the party with the burden of proof to demonstrate that background understandings of state law serve to create a pre-existing limitation on plaintiffs' title.

The protections guaranteed under the constitution do not support the majority's decision to read a statute that is, at best, ambiguous in such a way as to do away with the traditional right to property. This interpretation to validate an otherwise impermissible taking is clearly "beyond what the relevant background principles would dictate" (*Lucas*, 505 U.S. at 1030).[5]

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[4] While the majority refers to the reference to "raised lots" within section 2904 as somehow indicative of the proper meaning of "sunken," it should be noted that the reference to "raised lots" was not added to the provision until 1977 (LL 1977, No 27). Oversight of "sunken lots" has been included in the New York City Charter for decades (see section 388 of the 1901 revised charter; section 230 [l 1962, ch 998 §25]; *People ex rel. Collins v Ahearn*, 193 NY 441, 444).

[5] Neither may the majority's conclusion be supported by *Laba v Carey* (29 NY2d 302). In that case, this court noted that the City Charter places the responsibility for the maintenance and repair of sidewalks on the individual owner, thereby ensuring that sidewalks are at the legal grade which is "noting more than a normal incident to the ownership of real property with the City of New York" (29 NY2d at 312). The holding of that case is wholly

(continued...)

The doctrine of lateral support restricts the withdrawal of the support of any land naturally necessary to maintain another's land in its natural condition (RESTATEMENT (SECOND) OF TORTS, §817; 1 AM JUR 2d, Adjoining Landowners §40). As stated in *Hay v Cohoes Co.* (2 NY 159), "it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly restricted" (2 NY at 161).

This common law principle is limited to the support of land in its natural state when asserted by owners of adjacent property. Nevertheless, in the case of a public roadway, the common law obligation is extended to include the sustenance of lateral support for even the artificially created street. As stated in *Finegan v Eckerson* (26 Misc 574), "although, as claimed by the defendants, the right to lateral support between adjoining owners does not include the right to the support of an artificial structure, that doctrine has no application to the case of a highway" (id. at 575). While a certain amount of excavation might be permissible when land is in its natural state, the added pressure of an artificial structure will further limit what an adjoining landowner might do (see *Milburn v Fowler*, 27 Hun 568, 569-70; 3 Warren's Weed NEW YORK REAL PROPERTY, Lateral and Subjacent Support §2.04[1] [4th ed.]).

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[5] (...continued)
dissimilar to the circumstances here. The issue in *Laba* was whether the legal grade applicable to the sidewalks would inhere in title when a variance had previously been granted by the City. Similar to zoning ordinances and variances thereto, the Court simply ruled that the legal grade and variance were properly considered limitations within title (see also *Gazza, supra*). Here, there is no "legal" grade of plaintiffs' property. Moreover, the oft-cited duty to maintain and repair defective sidewalks is clearly dissimilar from heretofore unknown obligation to add side fill over 2400 square feet of one's property to protect a new, adjacent roadway construction.

The majority cites *Village of Haverstraw v Eckerson* (192 NY 54) as authority for its position that the common law does not permit compensation here. The case is not applicable.

While the majority relies upon *Village of Haverstraw* to create plaintiffs' obligation to raise their land to the legal grade, the express holding of that case is that a landowner could not do certain acts upon his own property that would injure a public street. As the Court concluded:

> My conclusion is that, whether the acts of persons menace the condition of a highway in a direct manner, or indirectly, by so digging or excavating upon the adjacent lands as to affect the lateral support and to cause or to threaten the subsidence of the highway, the exercise of the equitable power of the court may properly be invoked by the municipality in restraint of their continuance (192 NY at 6).

Thus the *Haverstraw* Court says nothing about the placing of side fill on property without the owner's consent or about any compensation due an owner as a result. The holding in *Haverstraw* simply applies the general obligation of lateral support to a roadway, an artificial structure which would not fall under an ordinary application of the doctrine (see *Adlin v Excelsior Brick Co.*, 129 AD 713, 715 ["It is not disputed that the rule of lateral support binds the owner of land along a highway, and that if he wrongfully excavate so close as to cause the highway to cave in he is liable for any damage caused thereby"]; *Milburn v Fowler*, 27 Hun 568, 570 [one may not dig on his own land "so as to cause a subsidence or destruction of the highway itself"]; *City of Troy v Murray*, 128 Misc 419 [defendant "has no right to further threaten the destruction of the streets in question, as the removal of sand and gravel has now reached the point that further excavation will result in the caving in of the street at some points"]).

However, the majority reads the "contemporary formulation" of the lateral support obligation much more broadly than any of our authorities have ever seen fit to do. Under the facts of this case, the City merely regraded a roadway, thereby rendering the area higher than plaintiffs' property. The "existing understanding" of the obligation of lateral support clearly does not apply here when it is the City that has caused the disparity. Moreover, there is no indication that the common law doctrine of lateral support negates plaintiffs' fundamental property interest in resisting a permanent physical occupation by the City.[6] Indeed, where a change in the grade of a public street led to damage to property, this Court has approved compensation to plaintiff only for a physical encroachment for a foundation wall (*McCabe v City of New York*, 213 NY 468). General damage to the property due to the regrading was not compensable.

Clearly, this common law principle does not support the proposition advanced by the majority. As the Supreme Court held in *Pumpelly v Green Bay Company* (80 U.S. 166):

> for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress... But we are of the opinion ... that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material,... it is a taking, within the meaning of the Constitution (80 U.S. at 181).

The ultimate question a court must answer upon a "taking" claim is whether government action inevitably forces property owners "alone to bear public burdens which, in all fairness and

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[6] There is no evidence that the purchase price paid by plaintiffs was based upon an awareness of the obligations and rights announced by the majority. Indeed, plaintiffs sued the sellers for fraud because they allegedly were unaware of such duties.

justice, should be borne by the public as a whole" (*Armstrong v US*, 364 U.S. 40, 49). The majority seems to argue that there has been no taking here because plaintiffs never had unrestricted title to the portion of the premises on which side fill was placed. The argument appears to be that the New York City Charter and the common law both prevented plaintiffs from having unrestricted title to this portion of the premises as part of the bundle of rights they acquired (see *Gazza, supra*).

The argument fails. Simply, adjoining property owners do not have an obligation under the common law to encumber their property for the lateral support of a raised road. Although the referenced provision of the City Charter sets forth certain obligations of a landowner which were not required under the common law, such obligations do not reach the circumstances here. Other than general language regarding the "broader" obligation to support an adjacent roadway by property owners, the interpretation of the City Charter advanced by the respondent and adopted by the majority finds no support as part of the "existing rules or understandings" of property law before this litigation.

While the majority characterizes the arguments presented herein as a "narrow" reading of the law, the interpretation is consistent with the authorities and evidence submitted by the respondent. It is the majority that expands the existing obligations under state property law beyond the limits that such law has heretofore been interpreted. The fact that the respondent has the burden to prove the result reached by the majority is especially troubling when one considers the substantial difference between the preservation of existing support and the obligation to create the level of additional support necessary under the circumstances. Indeed, under the subject City Charter provision, plaintiffs are required to suffer a permanent physical invasion of their property and pay for any direct property damage as well as the costs for respondent's

construction -- construction that would, ordinarily, constitute a compensable taking.

Allowing the City to justify the permanent physical occupation of part of plaintiffs' property on the basis of a spontaneous construction of the common law and a City Charter provision would be allowing the City, "'by *ipse dixit*, [to] transform private property into public property without compensation....'" (*Lucas*, *supra*, 505 US, at 1031, quoting *Webb's Fabulous Pharmacies, Inc. v Beckwith*, 449 U.S. 155, 164). The result reached by the majority is precisely the situation the Supreme Court refused to sanction in *Lucas*.

Finally, an easement on plaintiffs' property was not created when the City filed the map raising the legal grade of the street (*see*, *Nollan v California Coastal Commn.*, 483 U.S. 825, 833 n2). However, that filing may have thereafter limited the ability of plaintiffs to construct improvements on their property at any grade other than the legal grade (*see*, *People ex rel. Architects' Offices v Ormond*, 201 AD 787, 792, *affd* 234 NY 549; *Matter of Mellilo v Kracke*, 261 AD 631, 634). Until the City actually raised the grade of the street, however, it would have been impossible to determine the extent of any necessary taking of the property of plaintiffs or any other adjoining landowners.

In sum, plaintiffs have suffered a permanent physical occupation which constitutes a taking. The judgment appealed from and the order of the Appellate Division brought up for review should be reversed and the case remanded for a determination of just compensation.[7]

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[7] The issue of just compensation cannot be resolved on the current record. However, it should be noted that plaintiffs have the burden to demonstrate the value lost due to the taking and a conclusory assertion that the property is "worthless to them" is clearly insufficient.

**APPENDIX B** *

# Supreme Court of New York, Appellate Division, Second Department

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92-07294

Soon Duck Kim, *et al.*,
Appellants, *et al.*,
Plaintiffs,
v.
City of New York,
Respondent, *et al.*,
Defendants.

## OPINION

Richard S. Graver, Bayside, N.Y. (Peter C. Roth of counsel), for appellants.

Paul A. Crotty, Corporation Counsel, New York, N.Y. (Leonard Olarsch of counsel), for respondent.

JUDGES: LAWRENCE J. BRACKEN, J.P., SONDRA MILLER, DANIEL W. JOY, MYRIAM J. ALTMAN, JJ.

OPINION: DECISION & ORDER

In an action, *inter alia*, to recover damages for the alleged taking of property for public use without just compensation, the plaintiffs Soon Duck Kim, Man Suk Jun, and In Myung Jun appeal from an order of the Supreme Court, Queens County (DiTucci, J.), dated March 20, 1992, which denied their motion for partial summary judgment on the

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* This opinion is reported at 204 A.D.2d 711; 613 N.Y.S.2d 31.

second cause of action in the complaint and granted the cross motion of the defendant City of New York for summary judgment dismissing the second cause of action.

ORDERED that the order is affirmed, with costs.

The Supreme Court properly found that the placement of side fill on a portion of the plaintiffs' property to support the elevated grade of the abutting street did not effect a "taking" requiring the payment of "just compensation" (*see*, U.S. CONST 5th, 14th Amends; NY CONST, art I, §7[a]). Contrary to the plaintiffs' contention, the placement of the fill did not constitute a "permanent physical occupation" of their property by the defendant City of New York. Not every physical invasion of property is a "permanent physical occupation" (*see*, *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430, 432, 435, n 12, 73 L. Ed. 2d 868, 102 S. Ct. 3164). The plaintiffs' property rights in that portion of their property "occupied" were not effectively destroyed by the City's actions and consequently, there was no taking *per se* (*see*, *Loretto v Teleprompter Manhattan CATV Corp.*, *supra*, at 435-436; *Seawall Assocs. v City of New York*, 74 NY2d 92, 102, *cert denied* 493 U.S. 976, 107 L. Ed. 2d 503, 110 S. Ct. 500; *cf.*, *Pumpelly v Green Bay Co.*, 80 U.S. 166, 20 L. Ed. 557). The plaintiffs do not dispute the City's contention that the fill was necessary to support the street and prevent erosion, and there is no evidence that the placement of the fill had an impact on the plaintiffs' business or their use of the property. Therefore, no "taking" occurred (*see*, *Loretto v Teleprompter Manhattan CATV Corp.*, *supra*, at 432; *Penn Cent. Transp. Co. v New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646).

BRACKEN, J.P., MILLER, JOY and ALTMAN, JJ., concur.

May 31, 1994, Decided

## APPENDIX C*

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable COSMO J. DiTUCCI IA PART 14
Justice

| | | |
|---|---|---|
| SOON DUCK KIM, et al., | Index Number 5203 | 1990 |
| - against - | Motion Date January 21, | 1992 |
| THE CITY OF NEW YORK, et al. | Motion Cal. Number | 13 |

The following papers numbered 1 to 3 read on this motion by plaintiffs for partial summary judgment on their second cause of action against defendant The City of New York (hereinafter "the City") and a cross motion by the City for summary judgment dismissing the second cause of action.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits . . . . . | 1 |
| Notion of Cross Motion - Affidavits - Exhibits . | 2 |
| Answering Affidavits - Exhibits . . . . . | 3 |

Upon the foregoing papers it is ordered that the motion is denied and the cross motion is granted. Plaintiffs' second cause of action is dismissed.

On or about June 15, 1990, the City commenced the regrading of College Point Boulevard abutting plaintiffs' property to raise the street to its legal grade by elevating it

* [This opinion is unreported.]

approximately five feet. Plaintiffs' second cause of action arises from the City's placement of side fill on a portion of plaintiffs' below-grade property to support the street at its legal grade and to protect the street against erosion from the resulting lower grade of plaintiffs' property. Plaintiffs claim that this action by the City was an appropriation or "taking" of a portion of their property entitling them to compensation. However, following the reasoning of *Trubia v. Koch* (NYLJ, Aug. 15, 1979, at 13, col 1, *affd* 87 AD2d 742), this court holds that the City did not appropriate plaintiffs' property. As found by the *Trubia* court when presented with the same type of claim, since the City could have compelled plaintiffs to fill the property to legal grade at their own expense pursuant to New York City Charter § 2904, the claim of a taking where the City instead placed the fill at its expense must fail.

Plaintiffs' contention that the decision in *Loretto v. Teleprompter Manhattan CATV Corp.* (458 US 419), decided shortly after the *Trubia* affirmance (87 AD2d 742), requires a different result is without merit. The governmental action at issue in *Loretto* was totally dissimilar to that in the instant case. Furthermore, the holding in *Loretto* did not announce any new legal principle which could not have been considered by the *Trubia* court, but merely reaffirmed a long-standing rule of law. *(Loretto v. Teleprompter Manhattan CATV Corp., supra,* at 426, 441.)

This determination is without prejudice to any rights plaintiffs may have to an award for damage to buildings and improvements on their property caused by the change of grade. (Administrative Code of City of New York §3-318[a][2].)

Dated: March 20, 1992 .....

J.S.C.

# APPENDIX D

Photograph 4, Exhibit 2, Plaintiffs' Appendix, Supreme Court, Appellate Div. at A-45

Photograph 5, Exhibit 2, Plaintiffs' Appendix, Supreme Court, Appellate Div. at A-46

# APPENDIX E

## NEW YORK CITY CHARTER

## CHAPTER 71 DEPARTMENT OF TRANSPORTATION

Sec. 2904. Duties and obligations of property owner with respect to sidewalk flags, fencing of vacant lots and filling of sunken lots or cutting down of raised lots.

The owner of any property at his own cost, shall

(1) install, reconstruct, repave and repair the sidewalk flags in front of or abutting such property, including but not limited to the intersection quadrant for corner property, and

(2) fence any vacant lot or lots comprising part or all of such property and fill any sunken lot or lots comprising part or all of such property or cut down any raised lot or lots comprising part or all of such property whenever the transportation department shall so order pursuant to standards and policies of the transportation department and section 19-152 of the administrative code of the city of New York. In the event that the owner fails to comply with the provisions of this section, the transportation department may provide for the doing of same at the expense of the owner in the manner to be provided by local law and section 19-152 of the administrative code of the city of New York.

## APPENDIX F*

## MEMORANDUM

**Supreme Court**
**Queens County**
Special Term, Part 4

| | |
|---|---|
| MARY TRUBIA, et al. | Index No. 17646/78 |
| v. | BY KASSOFF, J. |
| EDWARD KOCH, etc., et al. | DATED July 2, 1979 |

Based on their allegations that the City's placement of fill on petitioners' gas station property which abuts Farmers Boulevard constituted an appropriation of petitioners' property for public use, petitioners have commenced this article 78 proceeding to compel respondents to commence a proceeding to determine the amount of compensation due petitioners for such taking. Respondents move to dismiss the petition on the ground that petitioners have failed to state a cause of action and that as a matter of law the relief sought is barred.

The facts are undisputed. On or about January 9, 1925 Map No. 1264, establishing the lines and grades of Farmers Boulevard relevant to the subject premises, was filed in the office of the Borough President of Queens County. The map, which had been adopted by the Board of Estimate and approved by the Mayor, established the legal grade of Farmers Boulevard

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* [This opinion is unreported.]

where petitioners' property abuts at approximately 13 feet. On or about July 29, 1947, petitioners Frank Trubia and Frank Cravotta took title to the subject premises. In 1950, the owners made an application for a building permit, the plans calling for construction of a gas station on the premises at the then existing grade of 7-½ feet. The owner's architect filed a statement with the Department of Buildings acknowledging that the proposed gas station was to be constructed below legal grade. The owners proceeded with construction and obtained a certificate of occupancy.

In 1970, the City entered into contracts calling for the construction of Farmers Boulevard to the full legal grade and for installation of a sewage system. On November 27, 1970, the City Highway Department, under section 230 of the City Charter (now section 2904 of the Charter) gave notice to the owners of the subject premises of its intention to improve Farmers Boulevard to its legal grade. The notice stated that side fill would have to be placed upon a portion of the subject lot in order to support the street at legal grade; that if a consent form permitting the side fill work was signed, there would be no charge to the owners for such work; but even if there was no consent, the Highway Department would perform the work and charge the owners for it as provided by section 230 of the City Charter. Frank Trubia, who received the notice and consent form, signed it and returned it to the Highway Department.

The issue for this court's determination is whether the City's placement of side fill on a portion of petitioners' property was an appropriation of that property which is compensable under the law.

It is a well established principle of law that a change of grade in a street may be made by public authorities without liability to adjacent property owners unless there is a statutory provision for an award of damages. (See *Matter of Mellilo v. Kracke*, 261 App Div 631.) Section B9-3.0(a) of the Administrative Code of the City of New York specifically

provides that "there shall be no liability for originally establishing a grade or for changing a grade except as provided in this section." None of the subdivisions of that section provide for any liability for changing grades under the circumstances of the instant case. Thus, it is clear that the City is not liable to petitioners for any injury to petitioners' property due to the elevation of Farmers Boulevard to its legally established grade.

Petitioners, however, contend that they are not seeking damages due to the change of grade of Farmers Boulevard. The claim for damages, according to petitioners, stems from the use of a portion of their property for the placement of earthen slopes used by the City for the support of the upgraded Farmers Boulevard.

The court finds that even if such a distinction is valid, the City, by its actions, has not appropriated petitioners' property. Under the statutory authority, instead of placing the fill on petitioners' property at its own expense, the City could have compelled the petitioners, at their own expense, to fill the property to legal grade. (Section 230 of the City Charter [now section 2904].)

Accordingly, petitioners' application is denied and the petition is dismissed.

Submit judgment.

. . . . . .

J.S.C.

## APPENDIX G*

Short Form Order

SUPREME COURT – STATE OF NEW YORK
I.A.S. PART VIII SUFFOLK COUNTY

INDEX NO. 12809-90

Present:
Hon. LAWRENCE
NEWMARK J.S.C.

MOTION DATE: ---------

MOTION NO.: PETITION DISMISSED
SETTLE JUDGMENT

| | | |
|---|---|---|
| In the Matter of the Application of FREDERICK BROTHERTON, Petitioner, –against– | : | PLTF'S/PET'S ATTY: Smith, Finkelstein, Lundberg, Isler & Yakaboski, Esqs. 456 Griffing Avenue Riverhead, NY 11901 |
| DEPARTMENT OF ENVIRONMENTAL CONSERVATION OF THE STATE OF NEW YORK, Respondent. | : | DEFT'S/RESP'S ATTY: Dennis C. Vacco Attorney General by John J. Sipos Asst Atty General The Capitol Albany, New York 12224 |

Upon the following papers numbered 1 to 127 read on this motion: Notice of Motion and supporting papers it is,

**Ordered that, upon remand from the Appellate Division, Second Department, and the evidentiary hearing before the undersigned pursuant thereto, the wetlands regulations considered together with denial of petitioner's application described herein, do not work an unconstitutional taking of the petitioner's property; and it is further**

**ORDERED that the proceeding is dismissed.**

**Settle judgment.**

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* [This opinion is unreported.]

The petitioner owns two separate parcels bounded by the Quogue Canal on the north side and the Atlantic Ocean on the south side. The parcels are separated by Dune Road. The deed to each parcel recites a boundary "to the center (of Dune Road)." The parcel abutting the canal is tidal wetlands with a mosquito ditch and wetlands vegetation thereon. The parcel abutting the ocean contains two houses.

In 1957 and 1958 the Atlantic Corporation purchased the canal side parcel for $8,500.00 and the ocean side parcel for $15,000.00. Respondent has objected to petitioner's characterizing Atlantic Corp. as wholly owned by the petitioner on the basis of disputes during discovery resulting in the order of the Hon. Melvyn Tanenbaum striking interrogatories regarding the history of Atlantic Corp.

Deeds, which are in evidence, however indicate that petitioner was the sole shareholder of Atlantic Corp. at the time the corporation was dissolved and the parcels were purchased by petitioner for $200.00 in 1979. Said deeds were recorded on December 31, 1979.

A bulkhead was constructed on the canal side tract in 1968. This bulkhead collapsed in June, 1983. Petitioner applied for a bulkhead permit, but discontinued his application in December, 1983.

On May 25, 1988, petitioner filed another application with the respondent ("DEC") for permission to replace the collapsed bulkhead with a ninety-one (91) foot bulkhead, construct a two hundred (200) foot bulkhead, and dump five hundred (500) cubic yards of fill into the area behind the bulkhead. Petitioner never sought the approval of the U.S. Army Corps of Engineers, as required by the Rivers and harbors Act of 1899 (33 U.S.C. §401, *et seq.*), and the Clean Water Act (33 U.S.C. §1251 *et seq.*); or of the appropriate local (i.e. County, Town and Village) regulatory authorities.

On September 19, 1988, the DEC granted petitioner a permit to rebulkhead the boat slip, to construct a new bulkhead, but not the two hundred foot bulkhead requested, and to dump a limited amount of fill behind the bulkhead and boat slip.[1] [2]

Petitioner appealed the determination. Upon hearing the matter, the Administrative Law Judge found that petitioner had not established the need for a bulkhead. The DEC adopted the ALJ's recommendation on May 23, 1990. On June 22, 1990, petitioner brought a proceeding, pursuant to Article 78, challenging the Commissioner's decision on the grounds that it lacked substantial evidence and constituted an unconstitutional "taking" of his property.

The matter was transferred to the Appellate Division; and in 1993 the Second Department determined that the DEC's decision with respect to the bulkhead was supported by substantial evidence, and that petitioner did not establish that the bulkhead was reasonable and necessary. The court then remanded the matter for an evidentiary hearing on whether the DEC's decision constituted an unconstitutional taking, Brotherton v. DEC, 189 A.D.2d 814, 592 N.Y.S.2d 437 (2d Dept 1993).

At the hearing, a licensed real estate appraiser and broker (Patrick A. Given) testified on behalf of the DEC that the entire property, running from the ocean to the bay, was worth approximately $1,100,000.00 as vacant land. He further testified that the canal side tract (approx. 1.6 acres) was worth $80,000.00 at its highest and best use, for recreational use and water access.

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[1] Petitioner has, apparently, been using the canal side tract as access to the canal for the purpose of traveling to his other east end properties.

[2] Petitioner alleges that the DEC's mandated "Use Letter" stated that a permit would not be issued for the construction of a house on the canal side tract, even though petitioner did not request this relief.

Gary P. Taylor, a licensed real estate appraiser and salesman testified for petitioner that, if the canal side tract were buildable as residential property and bulkheaded, it would have a value of $745,000.00. In its unbulkheaded and non-buildable condition, he valued the tract at $55,000.00. He estimated it would cost $30,000.00 to install a bulkhead and place fill on the property.

Aldo Andreoli, a consultant on environmental health, testified for petitioner that, if bulkheaded and filled, the tract would qualify for a septic tank leaching pool system.

Aerial photographs from 1955, 1974, 1980 and 1993 indicate, among other things, the presence on the property of a mosquito ditch. This led Mr. Andreoli to opine that the property had always been wetlands to a degree, but has now become almost entirely wetlands.[1]

The Tidal Wetlands Act (ECL §25-0101 *et seq.*) was enacted by the New York State legislature to preserve these vital areas. In order to protect the property owner, the legislature also provided for judicial review of DEC action taken pursuant to permit requests, Gazza v. DEC, 1997 WL 68590 (N.Y.)

The Court of Appeals in *Gazza*, *supra*, determined that petitioner could not succeed on his takings claim because, having purchased the property after the enactment of the wetlands legislation, he never owned the absolute right to build on his land without a variance.

This brings the court back to petitioner's argument that he owned the tract in question since 1958. Given the proceedings in discovery and the nature of the testimony at the hearing, there is no competent evidence before the court that petitioner

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[1] The Appellate Division's opinion in *Brotherton v. Dec*, *supra*, indicates that the DEC officially designated 1.5 of the 1.6 acres as tidal wetlands in 1989.

was the sole owner of the property since 1958. The property was owned by a separate corporate entity until its dissolution. The court, therefore, finds that this petitioner has owned the property since 1979.

Petitioner, an experienced builder/developer, took title to property limited by wetlands regulations, and could have had no reasonable investment-backed expectations constituting protected property interests, Ciampitti v. U.S., 22 CL.CT. 310, 320 (1991), Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646 (1978), Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992), *Gazza, supra*, Basile v. Town of Southampton, 222 A.D.2d 638, 636 N.Y.S.2d 97 (2d Dept 1995).

Further, the value $745,000.00 placed on the property by petitioner's expert assumes the granting of all permits necessary for the construction of a house. Except for Mr. Andreoli's statements regarding a septic system, such an assumption is without foundation in the record.

A property owner who challenges land regulations as an unconstitutional taking must demonstrate by "dollars and cents" evidence that under no permissible use would the parcel as a whole be capable of producing a reasonable return, Spears v. Berle, 48 N.Y.2d 254, 422 N.Y.S.2d 636 (1979), Smith v. Williams, 166 A.D.2d 536, 560 N.Y.S.2d 816 (2d Dept 1990), De St. Aubin v. Flacke, 68 N.Y.2d 66, 505 N.Y.S.2d 859 (1986).

Further, petitioner must establish every element of his claim beyond a reasonable doubt, a burden of proof which remains his throughout the case and never shifts to the State, *De St. Aubin, supra* @864. Petitioner's proof in this case fails to satisfy this burden.

Even if the canal side tract is considered as a separate parcel, there is ample evidence in the record that the property has recreational value. Petitioner, having historically used the

canal side tract for access to the canal and the bay, cannot establish that the DEC decision so restricts his property that he is precluded from using it for any purpose for which it is reasonably adapted, *De St. Aubin, supra* @865.

Finally, DEC makes a persuasive argument that the two parcels should be treated as a whole, given their unity of use and ownership since 1979, *see Penn Central, supra,* and *Ciampitti, supra.* As such, controverted proof indicates that the value of this parcel, as a whole, is $1,100.000.00 [*sic*].

In view of the foregoing, the court finds that the subject denial of petitioner's application did not work an unconstitutional taking of his property interests.

The petition is dismissed.

Dated: February 24, 1997

ENTER:

_____

J.S.C.

**APPENDIX H**

4th Civ. No. D027377 FILED April 8, 1997

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT DIVISION ONE

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| H.N. AND FRANCES C. BERGER FOUNDATION<br>Appellant,<br><br>v.<br><br>CITY OF ESCONDIDO, et al.,<br>Respondents. | [San Diego Superior Court Case No. N63317] |

Appeal From the Superior Court
County of San Diego
Hon. Kenneth G. Ziebarth, Jr., Judge

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RESPONDENTS' BRIEF

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[ EXTRACT FROM PAGES 43-44 ]

4. Berger Lacks Standing To Challenge that the Ordinance's Lack of Vacancy Decontrol Resulted in a Regulatory Taking.

Berger lacks standing to raise this regulatory taking challenge because when Berger acquired the Park in December of 1988 (AA 63; RA 8-9), the park was already subject to the Ordinance. See Carson Harbor, supra, 37 F.3d at 476-77 (Court rejected park owner's challenge that rent ordinance lack of vacancy decontrol did not "substantially advance any legitimate government interest" pointing out that since this was a "facial claim" an owner "must at least

demonstrate that he was a property owner subject to the statute at the time of its enactment").

The Carson Harbor decision is not unique in applying the "standing" requirement to regulatory taking challenges. See, e.g., Gazza v. New York State Department of Environmental Conservation, 1997 N.Y. LEXIS 99 (N.Y. February 18, 1997) (Court held that property owner could not establish a "taking" of its property where the regulation complained of was in existence at the time he purchased the property); Anello v. Zoning Board of Appeals of Village of Dobbs Ferry, 1997 N.Y. LEXIS 97 (N.Y. February 18, 1997) (same); Kim v. City of New York, 1997 N.Y. LEXIS 101 (N.Y. February 18, 1997) (same).